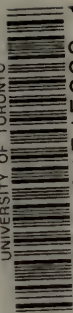


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THE
SECOND PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

VOL. I.

J. B. Thomas
1824.
III

THE
SECOND PART
OF THE

Institutes of the Laws of England.

CONTAINING
THE EXPOSITION OF MANY ANCIENT AND OTHER
STATUTES.

Part 2. vol. 3)

Jurisperito dixit, In lege quid scriptum est? quomodo legis? Luc. 10. 26.

Quod non lego, non credo. August.

*Jurisprudentia est juvenibus regimen, senibus solamen, pauperibus divitiæ,
& divitibus securitas.*

Authore EDUARDO COKE, MILITE, J. C.

Hæc ego grandævus posui tibi, candide lector.

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tions had been adopted, without any emendation, in the last printed edition in folio, not merely in the orthography and other trivial respects, but very frequently in the references to authorities, which are in many instances very erroneously printed.

It had been proposed to accompany each Chapter with notice of various judicial determinations and observations of later writers, which appear to contradict some of the authorities, positions and doctrines contained more particularly in the Third and Fourth Institute, as also with Notes explanatory of such alterations as have successively taken place in the law, relating to the subjects of these Institutes, since the time of Lord Coke; and some collections and progress have accordingly been made towards that undertaking: But it has since been found adviseable to preserve the original order and connection of Lord Coke's Work, and to present, at a future period, those Notes in a separate form, correspondent to the several divisions and chapters of these Institutes, in conformity with the arrangement of the text and notes in the last improved edition of the First Institute.

Jan. 23,
1797.

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IX

D E O,
P A T R I Æ,
T I B I.

A P R O E M E
TO THE
SECOND PART *of the* INSTITUTES.

I N the first part of the Institutes, following Littleton our guide, we have treated of such parts of the common laws, statutes, and customes, as he in his three books hath left unto us. We are in this second part of the Institutes to speak of *Magna Charta*, and many ancient and other statutes, as in the table precedent doe appeare.

It is called *Magna Charta*, not that it is great in quantity, for there be many voluminous charters commonly passed, specially in these later times, longer then this is; nor comparatively in respect that it is greater then *Charta de Foresta*, but in respect of the great importance, and weightinesse of the matter, as hereafter shall appeare: and likewise for the same cause *Charta de Foresta*, is called *Magna Charta de Foresta*, and both of them are called *Magnæ Chartæ libertatum Angliæ*.

King Alexander was called Alexander Magnus, not in
A 4 respect

Marlb. cap. 5.
Inspex. 25 E. 1.
12 H 3. *Sententia lata super chartas*. Bract. lib. 3. fol. 271. & lib 5 fol. 414.
Mirror, cap. § Regist.
8 E. 3. Itin' Pick. Rot. 43.
Atons case. Rot. Pat. 20.
Marci 1 E. 3. de perambulatione for' in com' Essex. Rot. Parl. 22 E. 3. nu. 36.

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respect of the largeness of his body, for he was a little man, but in respect of the greatness of his heroical spirit, of whom it might be truly said,

Mens tamen in parvo corpore magna fuit;

so as of this great charter it may be truly said, that it is *magnum in parvo*.

And it is also called *Charta libertatum regni*; and upon great reason it is so called of the effect, *quia liberos facit*: sometime for the same cause, *communis libertas*, and *le chartre des franchises*.

The Ends.
Sapiens incipit à fine.

There be four ends of this great charter, mentioned in the preface, *viz.* 1. The honour of Almighty God, &c. 2. The safety of the kings soule; 3. The advancement of holy church; and 4. The amendment of the realme: foure most excellent ends, whereof more shall be said hereafter.

By what authority, and when.

By charter bearing date the 11. day of February, in the 9. yeare of king H. 3. and secondly, by that charter established by authority of parliament then sitting, and so entred into the parliament roll; the witnesses to the said charter were 31. lords spirituall, *viz.* Stephen Langton archbishop of Canterbury, E. bishop of London, I. B. of Bath, P. of Winchester, H. of Lincoln, Robert of Salisbury, W. of Rochester, W. of Worcester, I. of Ely, H. of Hereford, R. of Chichester, William of Exeter, bishops. The abbot of S. Edes, the abbot of S. Albons, the abbot of Battaile, the abbot of S. Augustines in Canterbury, the Abbot of Evesham, the abbot of Westminster, the abbot of Burghes S. Peter, the abbot of Reading, the abbot of Abindon, the abbot of Malmesbury, the abbot of Winchcombe, the abbot of Hyde, the abbot of Certeley, the abbot of Shernborn, the abbot of Cerne, the abbot of Abbotebury, the abbot of Middleton, the abbot of Selbie, the abbot of Cirencester; and 33. of the nobility, *viz.* Hubert de Burgo chiefe justice of England,

*

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land, and 32. earles and barons, viz. Randall earle of Chester and Lincoln, William earle of Salisbury, William earle Warren, Gilbert of Clare earle of Glocester and Hertford, William de Ferrars earle of Derby, William Mandevile earle of Essex, H. de Bigod earle of Norfolk, William earle of Albemarle, H. earle of Hereford, John Constable of Chester, Robert de Ros, R. Fitzwalter, Robert de Vipount, William de Bruer, R. de Mountfitchet, P. Fitzherbert, William de Aubeine, Robert Gresly, Reignald de Brehus, John de Movenne, J. Fitz-Alen, Hugh de Mortimer, Walter de Beauchamp, William de S. John, Peter de Mololacu, Brian de Lisle, T. de Multon, Richard de Argentine, Jeffrey de Nevill, William Maudint, John de Baalim, and others.

There were many of the great charters, and *Charta de Foresta*, put under the great seale, and sent to archbishops, bishops, and other men of the clergie, to be safely kept, whereof one of them remain at this day at Lambeth, with the archbishop of Canterbury.

The great providence and policy for preservation of it.

Also the same was entred of record in a parliament roll.

And after king E. 1. by act of parliament did ordain that both the said charters should be sent under the great seale, as well to the justices of the forest, as to others, and to all sheriffes, and to all other the kings officers, and to all the cities through the realm, and that the same charters should be sent to all the cathedrall churches, and that they should be read and published in every county four times in the yeare in full county, viz. the next county day after the feast of S. Michael, and the next county day after Christmas, and the next county day after Easter, and the next county day after the feast of S. John.

25 E. 1. cap. 10.

25 E. 1. cap. 3.
28 E. 1. ca. 2.
& 17.

It was for the most part declaratory of the principall grounds of the fundamentall laws of England, and for the residue it is additionall to supply some defects of the common

The quality.

law;

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Mat. Par. fo.
246, 247, 248.

law; and it was no new declaration: for king John in the 17 yeare of his raigne had granted the like, which also was called *Magna Charta*, as appeareth by a record before this great charter made by king H. 3.

Pasch. 5 H. 3.
tit' Mordaunc'
f. 53.

Home ne fuer' mordane' apud Westmonasterium des terres in auter countie, car ceo ser encont' lestatut de Magna Charta sinon que illa affisa semel interminata fuit coram justie'.

Stat. 25 E. 1.
Confirm. Chart.

Also by the said act of 25 E. 1. (called *Confirm' Chartar'*) it is adjudged in parliament that the great charter, and the charter of the forest should be taken as the common law.

How and upon
what grounds it
hath been im-
pugned.

Soon after the making of this great charter, the young king by evill counsell fell into great dislike with it, which *Hubert de Burgo summus justiciarius Angliæ* perceiving (who in former times had been a great lover, and well deserving patriot of his country, and learned in the laws (for *Rot. clauf. 11 H. 3. membr. 44.* I finde that he, and many others were justices itinerant in 5 H. 3. and I have seen a fine levied before him, and fixe other judges, between Stephen de Wamcesle, and the abbot of Hales) yet meaning to make this a step to his ambition (which ever rideth without reines) perswaded and humored the king that he might avoid the charter of his father king John by duresse, and his own great charta, and *Charta de Foresta* also, for that he was within age when he granted the same, whereupon the king in the 11 yeare of his raign, being then of full age, got one of the great charters, and of the forest into his hands, and by the counsell principally of this Hubert his chiefe justice, at a councill holden at Oxford, unjustly cancelled both the said charters, (notwithstanding the said Hubert de Burgo was the premier witnesse of all the temporall lords to both the said charters) whereupon he became in high favour with the king, insomuch as he was soon after (*viz.* the 10 of December, in the 13 yeare of that king, created to the highest dignity that in those times any subject had) to be an earle, *viz.* of

Rot. clauf.
11 H. 3. membr.
44. 5 H. 3.

Kent.

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XII

Kent. But soon after (for flatterers and humorists have no sure foundation) he fell into the kings heavy indignation, and after many fearfull and miserable troubles, he was justly, and according to law sentenced by his peeres in open parliament, and justly degraded of that dignity which he unjustly had obtained by his counsell for cancelling of *Magna Charta*, and *Charta de Foresta*. And the king by his charter granted, *Quod nos firmiter & integre tenebimus iudicium de Huberto de Burgo per barones dictum*; he was buried in the Frier Predicants where Whitehall is now built, so as no monument remains of him at this day.

Rot. clauf. 17 H.
3. m. 1. & 2.
Rot. Pat. 17 H.
2. m. 1. à tergo
& 12.

In this advice Hubert de Burgo either dissembled his opinion, or grossly erred (as ever ambitious flattery bedazes the eye, even of them, that be learned) first, for that a king cannot avoid his charter, albeit he make it when he is within age, for in respect of his royall and politique capacity as king, the law adjudgeth him of full age. Secondly, it being done by authority of parliament, and enrolled of record, it was strange, that any man should think that the king could avoid them in respect he was within age. Thirdly, it was to no end to cancell one where there were so many, or to have cancelled all, when they were of record in the parliament roll, or to have cancelled roll and all, when they were, for the most part, but declaratories of the ancient common laws of England, to the observation, and keeping whereof, the king was bound and sworn. What successe those potent and opulent subjects, Hugh Spencer the father, and son had, for giving rash and evill counsell to king E. 2. *enconter la forme de la grand chartre*, I had rather you should read then I should declare.

*Exilium turgentis
la Spencer pais
& filii.*

After the making of *Magna Charta*, and *Charta de Foresta*, divers learned men in the laws, that I may use the words of the record, kept schooles of the law in the city of London, and taught such as resorted to them, the laws of the realme, taking their foundation of *Magna Charta*, and *Charta de Foresta*,

Rot. clauf. anno
19 H. 3. m. 22.

A PROEME.

Foreſta, which as you have heard, the king by ill advice fought to impeach.

19 H. 3. ubi
ſupra.

The king in the 19 year of his raign, by his writ, commanded the maior and ſheriffes of London, *Quod per totam civitatem London clamari faciant & firmiter prohiberi, ne aliquis ſcholas tenens de legibus in eadem civitate de cætero ibidem leges doceat, & ſi aliquis ibidem fuerit huiusmodi ſcholas tenens, ipſum ſine dilatione ceſſare fac*; Teſte Rege, &c. 11 die Decembris, anno regni ſui decimo nono. But this writ took no better effect then it deſerved, for evill counſell being removed from the king, he in the next yeare, viz. in the 20 yeare of his raigne compleat, and in the one and twentieth yeare current, did by his charter under his great ſeale confirme both *Magna Charta*, and *Charta de Foreſta*, he being then 29 years old. And after in the 52 yeare of his raigne eſtabliſhed and confirmed both the ſame by act of parliament, with the claufe, *Quod contravenientes per dominum regem, cum con- viſi fuerint, graviter puniantur*. Hereby ſhall ſome opinions and reſolutions in our books be the better underſtood, which ſpeak of alienations without liſenſe before or after 20 H. 3. which yeare was named for that the king then confirmed the ſaid great charter, and in like manner did king E. 1. by act of parliament in the 25 year of his raign: and the ſaid two charters have been confirmed, eſtabliſhed, and commanded to be put in execution by 32 ſeverall acts of parliament in all.

Marb. cap. 5.
75 E. 4. 13.

20 Aſſ. p. 17.
14 H. 4. 2, & 3.
Br. Alien. tanſ
licenſe. 10.

Of what high
eſtimation it
hath been.

This appeareth partly by that which hath been ſaid, for that it hath ſo often been confirmed by the wiſe providence of ſo many acts of parliament.

Confirm. Chart.
25 E. 1. ca. 1.
& 2. Vet. Mag.
Chart. 2. part,
fol. 35.

And albeit judgements in the kings courts are of high regard in law, and *judicia* are accounted as *juris dicta*, yet it is provided by act of parliament, that if any judgement be given contrary to any of the points of the great charter, or *Charta de Foreſta*, by the juſtices, or by any other of the kings

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XV

kings ministers, &c. it shall be undone, and holden for nought.

And that both the said charters shall be sent under the great seale to all cathedrall churches throughout the realm there to remain, and shall be read to the people twice every yeare.

25 E. 1.
ubi supra.

The higheft and most binding laws are the statutes which are established by parliament; and by authority of that higheft court it is enacted (only to shew their tender care of *Magna Charta*, and *Charta de Foresta*) that if any statute be made contrary to the great charter, or the charter of the forest, that shall be holden for none: by which words all former statutes made against either of those charters are now repealed; and the nobles and great officers were to be sworn to the observation of *Magna Charta*, and *Charta de Foresta*.

42 E. 3. cap. 1.
25 E. 1. ubi
supra.

Magna fuit quondam magnæ reverentia chartæ.

We in this second part of the Institutes, treating of the ancient and other statutes have been enforced almost of necessity to cite our ancient authors, Bracton, Britton, the Mirror, Fleta, and many records, never before published in print, to the end the prudent reader may discern what the common law was before the making of every of those statutes, which we handle in this work, and thereby know whether the statute be introductory of a new law, or declaratory of the old, which will conduce much to the true understanding of the text it selfe. We have also sometime in this and other parts of the Institutes, cited the Grand Customier de Normandy, where it agreeth with the laws of England, and sometime where they disagree, *ex diametro*, being a book compounded as well of the laws of England, which king Edward the Confessor gave them, as he that commenteth upon that book testifieth (as elsewhere we have noted) as of divers customes of the duchie of Normandie, which book was composed

A PROEME.

posed in the raigh of king H. 3. viz. about 40 yeares after the coronation of king Richard the first, 3 *Septembris anno* 1 of his raigh, *anno Dom.* 1189. about 138 yeares after the conquest. See that book cap. 22. fo. 29. a. and the comment upon the same, & cap. 112. In which Customier a great number of the courts of justice, of the originall writs, and of many other of the titles of the laws of England, are not so much as named or mentioned. And seeing we have in these, and other parts of our Institutes, cited the laws and statutes of divers kings before the conquest, and in the Conquerors time, we have thought good for the ease of the reader, to set down the times wherein those kings lived, and deceased. *Inas* began to raigh *anno Dom.* 689. and deceased 726. *Aluredus*, alias *Alfredus*, alias *Elfredus*, began to raigh *anno Dom.* 872. and deceased 901. Of this *Alured* it is thus written, *Aluredus acerrimi ingenii princeps per Grimboldum & Johannem doctissimos monachos tantum instructus est, ut in brevi librorum omnium notitiam haberet, totumque novum & vetus Testamentum in eulogiam Anglicæ gentis transmutaret (cujus translationis pars nobis feliciter accidit.)* This learned king in advancement of divine and humane knowledge, by the perswasion of those two monks founded the famous university of Cambridge. *Edwardus*, son of the said *Alured*, began to reign *anno Dom.* 901. and deceased 924. ^a *Ethelstanus*, alias, *Adelstane* eldest son of the said Edward began to raigh *anno Dom.* 924. and deceased 940. ^b *Edmundus* began to raigh *anno Dom.* 940. and deceased 46. ^c *Edgarus* began to raigh *anno Dom.* 959. and deceased 975. ^d *Etheldredus* began to raigh *anno Dom.* 979. and deceased 1016. ^e *Canutus* began to raigh *anno Dom.* 1016. and deceased 1035. ^f *Edwardus* began to raigh *anno Dom.* 1042. and deceased 1066. ^g *Willielmus Bastardus* began to raigh *anno Dom.* 1066. and deceased 1087.

Some fragments of the statutes in the raighs of the above-
said

In Historia Eli-
casi fol. 38. lib.
2.

Cl: Caius D. m.
Cant.

^a Fortis, sapiens,
& fortunatus:

Danos expulsi &
Angliam in mo-
narchiam reduxit.

^b Martir apud
Hoxon olim He-
gisdon.

^c Pacificus, rex
excellentissimus.

^d Named in Do-
mesday, Glouc'
Ecclesia de Eve-
sham. A delredus.

^e In Domesday
he is ever writ-
ten Crut' Rex.

^f He is ever cal-
led in Domesd.
Episcopus S.

Edw. Cestri: Rex
Edwardus dedit
regi Griffino ter-
ram quæ jacebat
trans aquam quæ
De vocatur.

^g He is in
Domes. written
Willielmus Rex,
vel Willielmus,
vel W. Rex.

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old kings doe yet remain, but not onely many of the statutes, and acts of parliament, but also the books and treatises of the common laws both in these and other kings times, and specially in the times of the ancient Brittons (an inestimable losse) are not to be found.

It is to be observed that in Domestday Haroldus, who usurped the crown of England, after the decease of king Edward the Confessor, is never named *per nomen regis, sed per nomen Comitiss Haroldi, seu Heraldii*; and therefore we have omitted him.

In citing of the abovesaid laws originally written in the Saxon tongue, we have referred you to M. Lambard, who accurately and faithfully translated the same into Latin, one page containing the Saxon, and next the Latin, and is in print (for our manner is not to cite any thing, but so to referre the reader, as he may easily finde it;) *sed ut unicuique suus tribuatur bonus*, all those statutes in the reigns of all the abovesaid kings were of ancient time plainly and truly translated into Latin, (whereof we have a very ancient, if not the first manuscript) which no doubt did not a little abbreviate M. Lambards pains.

Upon the text of the civill law, there be so many glosses and interpretations, and again upon those so many commentaries, and all these written by doctors of equall degree and authority, and therein so many diversities of opinions, as they do rather increase then resolve doubts, and incertainties, and the professors of that noble science say, that it is like a sea full of waves. The difference then between those glosses and commentaries, and this which we publish, is, that their glosses and commentaries are written by doctors, which be advocates, and so in a manner private interpretations: and our expositions or commentaries upon Magna Charta, and other statutes, are the resolutions of judges in courts of justice in judicall courses of proceeding, either related and reported in our books, or extant in judicall records, or in both, and therefore

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therefore being collected together, shall (as we conceive) produce certainty, the mother and nurse of repose and quietness, and are not like to the waves of the sea, but
Statio bene fida peritis : for Judicia sunt tanquam juris dicta.

Finis Proœmii.

But now let us peruse the Text it self.

MAGNA

MAGNA CHARTA.

EDITA Anno nono H. III.

HENRICUS Dei gratia rex Angliæ (1), dominus Hiberniæ, dux Normaniæ, et Aquitaniæ, et comes Andegaviæ, archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus (2), vicecomitibus, præpositis, ministris, et omnibus ballivis, et fidelibus suis, præsentem chartam inspecturis, salutem. Sciatis quod nos intuitu Dei, et pro salute animæ nostræ, &c. et ad exaltationem sanctæ ecclesiæ, et emendationem regni nostri (3), spontanea et bona voluntate nostra (4), dedimus et concessimus archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, et omnibus liberis de regno nostro, has libertates subscriptas, tenend' in regno nostro Angliæ in perpetuum.

HENRY by the grace of God, king of England, lord of Ireland, duke of Normandy and Guyan, and earl of Anjou, to all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, officers, and to all bailiffs, and other our faithful subjects, which shall see this present charter, greeting. Know ye that we, unto the honour of Almighty God, and for the salvation of the souls of our progenitors and successors kings of England, to the advancement of holy church, and amendment of our realm, of our meer and free will, have given and granted to all archbishops, bishops, abbots, priors, earls, barons, and to all free-men of this our realm, these liberties following, to be kept in our kingdom of England for ever.

(1 Inst. 81. Statutes of Confirmation. 52 H. 3. c. 5. 25 Ed. 1. c. 1, 2, 3, & 4. 28 Ed. 1. stat. 3. c. 1. 1 Ed. 3. stat. 2. c. 1. 2 Ed. 3. c. 1. 4 Ed. 3. c. 1. 5 Ed. 3. c. 1, 9. 10 Ed. 3. stat. 1. c. 1. 14 Ed. 3. stat. 1. c. 1. 15 Ed. 3. c. 1. 28 Ed. 3. c. 1. 31 Ed. stat. 1. c. 1. 36 Ed. 3. c. 1. 37 Ed. 3. c. 1. 38 Ed. 3. stat. 1. c. 1. 42 Ed. 3. c. 1. 45 Ed. 3. c. 1. 50 Ed. 3. c. 2. 1 Rich. 2. c. 1. 2 Rich. 2. c. 1. 5 Rich. 2. c. 1. 6 Rich. 2. c. 1. 7 Rich. 2. c. 2. 8 Rich. 2. c. 1. 12 Rich. 2. c. 1. 1 Hen. 4. c. 1. 2 Hen. 4. c. 1. 4 Hen. 4. c. 1. 7 Hen. 4. c. 1. 9 Hen. 4. c. 1. 13 Hen. 4. c. 1. 4 Hen. 5. c. 1.)

(1) *Henricus Dei gratia Rex Angliæ, &c.*] Concerning the styles of the kings of England, both before and after this king, and how often they altered the same, see in the first part of the Institutes, *Sectione prima.*

(2) *Archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, &c.*] This or the like particular direction, this king and his progenitors before him used; and so did E. 1. E. 2. and E. 3. King R. 2. in his letters patents used a more generall, and compendious direction, viz. *Omniibus ad quos præsentis literæ pervenerint, &c.* which direction is used to this day, saving in charters of creation of dignities, the directions to this day, are *archiepiscopis, episcopis, ducibus, marchionibus, &c.* and *hiis testibus*, in the end.

(3) *Nos intuitu Dei, pro salute animæ nostræ, ad exaltationē sanctæ ecclesiæ, et emendationem regni nostri.*] Here bee soure notable causes of the making of this great charter rehearsed. 1. The honour of

The first Part of the Institutes, *Sec. 1.*

Note not onely the preamble of this Charter, & of the forest, but the bodies of the Charters themselves are contained in the Charter of King John, An. 17. of his reign, *Mat. Par. pag. 246.* *Quæ ex parte maxima leges antiquas & regni consuetudines continerant. p. 244.*

II. INST.

B

God.

God. 2. For the health of the king's soul. 3. For the exaltation of holy church; and fourthly, for the amendment of the kingdom.

These be those excellent laws contained in this great charter, and digested into 38. chapters, which tend to the honour of God, the safety of the king's conscience, the advancement of the church, and amendment of the kingdom, granted and allowed to all the subjects of the realme.

[2]

(4) *Spontanea, et bona voluntate nostra.*] These words were added, for that king John, as hath been said, made the like charter in effect, and sought to avoid the same, pretending it was made by duress.

This great charter is divided into 38. chapters.

C A P. I.

I*MPRIMIS, concessimus Deo (1), et hac presenti charta nostra confirmavimus pro nobis et hæredibus nostris in perpetuum (2), quod ecclesia Anglicana (3), libera sit (4), et habeat omnia jura sua integra (5), et libertates suas illæsas (6). Concessimus etiam, et dedimus omnibus liberis hominibus regni nostri (7), pro nobis et hæredibus nostris in perpetuum, has libertates subscriptas (8). Tenend' et habend' eis et hæredibus, (9) suis, de nobis, (10) et hæredibus nostris in perpetuum.*

FIRST, we have granted to God, and by this our present charter have confirmed, for us and our heirs for ever, that the church of England shall be free, and shall have all her whole rights and liberties inviolable. We have granted also, and given to all the free-men of our realm, for us and our heirs for ever, these liberties underwritten, to have and to hold to them and their heirs, of us and our heirs for ever.

(2 Inst. 1. 52 H. 3. c. 5. & 42 Ed. 3. c. 1.)

* Inter Leges seu Institutiones Regis, H. 1. cap. 1.

*Sanctam * Dei, inprimis, ecclesiam liberam facio, ita quod nec vendam, nec ad firmam ponam, nec mortuo archiepiscopo sive episcopo, vel abbate aliquid accipiam de dominio ecclesiæ, seu de hominibus ejus, donec successor in eam ingrediatur, et omnes malas consuetudines, quibus regnum Angliæ injuste opprimebatur, inde aufero.*

(1) *Concessimus Deo.*] We have granted to God: when any thing is granted for God, it is deemed in law to be granted to God, and whatsoever is granted to his church for his honour, and the maintenance of his religion and service, is granted for and to God; *Quod datum est ecclesiæ, datum est Deo.*

See the first part of the Institutions. Sect. 1.

And this and the like were the formes of ancient acts and graunts, and those ancient acts and graunts must be construed and taken as the law was holden at that time when they were made.

Here in this charter, both in the title and in divers parts of the body of the charter, the king speaketh in the plural number, *concessimus*. The first king that I read of before him, that in his graunts wrote in the plural number, was king John, father of our king

king H. 3. other kings before him wrote in the singular number, they used *Ego*, and king John, and all the kings after him, *Nos*.

(2) *Pro nobis et hæredibus nostris inperpetuum.*] These words were added to avoid all scruples, that this great parliamentary charter might live and take effect in all successions of ages for ever. More of this word (heires) hereafter in this chapter: When *Pro nobis, hæredibus et successoribus nostris* came in, shall be shewed in his fit place.

(3) *Quod ecclesia Anglicana, &c.*] This at the making of this great charter, extended not to Ireland, nor to any of the king's foraign dominions; but by the law of Poynings, made by the authority of parliament in Ireland, in anno 11. H. 7. all the laws and statutes of this realm of England before that time had or made do extend to Ireland, so as now Magna Charta doth extend into Ireland.

(4) *Quod ecclesia Anglicana libera sit.*] That is, that all ecclesiasticall persons within the realm, their possessions, and goods, shall be freed from all unjust exactions and oppressions, but notwithstanding should yeeld all lawfull duties, either to the king or to any of his subjects, so as *libera* here, is taken for *liberata*, for as hath been said, this charter is declaratory of the ancient law and liberty of England, and therefore no new freedom is hereby granted, (to be discharged of lawfull tenures, services, rents and aids) but a restitution of such as lawfully they had before, and to free them of that which had been usurped and incroached upon them by any power whatsoever; and purposely, and materially, the charter saith *ecclesia*, because *ecclesia non moritur*, but *moriuntur ecclesiastici*, and this extends to all ecclesiasticall persons of what quality or order soever.

(5) *Et habeat omnia jura sua integra.*] That is, that all ecclesiasticall persons shall enjoy all their lawful jurisdictions, and other their rights wholly without any diminution or subtraction whatsoever; and *jura sua* prove plainly, that no new rights were given unto them, but such as they had before, hereby are confirmed; and great were sometimes their rights, for they had the third part of the possessions of the realme, as it is affirmed in a parliament roll.

(6) *Et libertates suas illæfas.*] *Libertates* are here taken in two senses. 1. For the laws of England so called, because *liberos faciunt*, as hath been said. 2. They are here taken for priviledges held by parliament, charter or prescription more then ordinary; and in this sense it is taken in the writ *De libertatibus allocandis*, and in another writ *De libertatibus exigendis in itinere*, but it is but *libertates suas*, such as of right they had before; *jura ecclesiæ publicis æquiparantur*.

Every archbishoprick and bishoprick in England are of the king's foundation, and holden of the king *per baroniam*, and many abbots and priors of monasteries were also of the king's foundation, and did hold of him *per baroniam*, and in this right the archbishop and bishops, and such of the abbots and priors as held *per baroniam*, and called by writ to parliament, were lords of parliament; and this is a right of great honour that the church, viz. the archbishop and bishops now have. *Ecclesia est infra ætatem, et in custodia Domini Regis, qui tenetur jura et hæreditates suas manuteneri et defendere*; and in other records it is said, *Ecclesia quæ semper est infra ætatem fungitur semper vice minoris, nec est juri con-*

[3]

Rot. Parliam.
4 R. 2. Nu. 13.

Regist. fol. 19:
& 262.
F. N. B. fo.
229.
Regula.

Glanv. l. 7.
c. 1. Bract. lib.
3. fol. 226. l. 5.
fo. 427. Tr. 22.
E. 1. in com.

Banc. R.
Fleta lib. 2.

See hereafter
c. 21. 14 E. 3.
cap. 12. stat. 2.
18 E. 3. cap. 4.
1 R. 2. cap. 3.
8 E. 3. fol. 26.
Regist. 289.
vid. 27. H. 8.
c. 24. vid.
postea. c. 21.

sonum quod infra ætatem existentes, per negligentiam custodum suorum exheredationem patiantur seu ab actione repellantur.

They are discharged of purveyance for their own proper goods.

And this was the ancient common law, and so declared by divers acts of parliament, and there is a writ in the register for their discharge in that behalfe: and this is not restrained by the said act of 27. H. 8. for thereby it is provided that the purveyor shall observe the statutes for them provided, so as where the purveyor is prohibited to purvey by any statute, the said act of 27 H. 8. setteth him not at liberty.

And true it is, that ecclesiasticall persons have more and greater liberties then other of the king's subjects, wherein, to set down all, would take up a whole volume of it self, and to set down no example, agreeth not with the office of an expositor; therefore some few examples shall be expressed, and the studious reader left to observe the rest as he shall readeth them in our books, and other authorities of law.

Regist. 58.
F. N. B. 175.

If a man holdeth lands or tenements, by reason whereof he ought (upon election, &c.) to serve in a temporall office, if this man be made an ecclesiasticall person within holy orders, he ought not to be elected to any such office, and if he be, he may have the king's writ for his discharge, and the words of the writ are observable, *Rex, &c. cum secundum legem et consuetudinem regni nostri Angliæ clerici infra sacros ordines constituti ad tale officium eligi non debeant, nec hactenus consueverunt, &c.* and the reason thereof is expressed in the writ, *Quia juri non est consonum, quod hii qui salubri statu animarum, &c. (in tali loco, &c.) deservunt, alibi extra (eundem locum) secularibus negotiis compellantur.*

[4]
2 Timot. c. 2.

Litt. fol. 20.
Regist. fol.
F. N. B. 227,

By this writ it appeareth that this was the ancient common law, and custome of England, and had a sure foundation, *Nemo militans Deo, implicet se negotiis secularibus, ut ei placeat cui se probavit.* Ecclesiasticall persons have this priviledge that they ought not in person to serve in warre. Also ecclesiasticall persons ought to be quit and discharged of tolles and customes, avirage, pontage, paviage, and the like, for their ecclesiasticall goods, and if they be molested therefore, they have a writ for their discharge, by which writ it appeareth that this was the ancient common law of England. *Rex, &c. cum personæ ecclesiasticæ secundum consuetudinem hactenus in regno nostro usitatam, et approbatam; ac ad telonium, paviagium et muragium, &c. de bonis suis ecclesiasticis alicubi in eodem regno præssand^o nullatenus teneantur, &c.*

F. N. B. 29.
Regist. 289.

If any ecclesiasticall person be in feare or doubt that his goods or chattells, or beasts, or the goods of his farmor, &c. should be taken by the ministers of the king, for the businesse of the king, he may purchase a protection *cum clausula nolumus.*

See the exposition of the statute of Artic. Cler. cap. 9.
Regist. 300. F. N. B. 266. a. 16. E. 3.
proces 165.
Regist. judi. 22.

Distresses shall not be taken by sheriffs or other of the king's ministers in the inheritance of the church wherewith it was anciently endowed, but otherwise it is of late purchase.

If any ecclesiasticall person knowledge a statute merchant or statute staple, or a recognizance in the nature of a statute staple, his body shall not be taken by force of any proceſſe thereupon, and for more surety thereof the writ thereupon to take the body of the conuſor is *si laicus sit.*

If a person bee bound in a recognizance in the chancery or in any

any other court, &c. and he pay not the sum at the day, by the common law, if the person had nothing but ecclesiasticall goods, the recognizee could not have had a *levari fac'* to the sheriffe to levie the same of these goods, but the writ ought to be directed to the bishop of the dioces to levie the same of his ecclesiasticall goods.

^a In an action brought against a person (wherein a *capias* lieth) for example, an account, the sheriffe returns *quod clericus est beneficiatus, nullum habens laicū feodum*, in which he may be summoned, in this case the plaintiffe cannot have a *capias* to the sheriffe to take the body of the person, but he shall have a writ to the bishop to cause the person to come and appeare. But if he had returned *quod clericus est nullum habens laicum feodum*, then is a *capias* to be granted to the sheriffe, for that it appeared not by the returne that he had a benefice, so as he might bee warned by the bishop his diocefan, and no man can be exempt from justice. See more of this matter *Artic. Cleri. cap. 9.*

Secundum legem et consuetudinē regni Angliæ clerici in decenna, &c. poni non debeant, vel ea occasione distringi vel inquietari non consueverunt: and ecclesiasticall persons are not bound to appeare at tournes or viewes of frankpledge.

But hereof this little taste shall in this place suffice, with this, that as the overflowing of waters doe many times make the river to lose his proper channell, so in times past ecclesiasticall persons seeking to extend their liberties beyond their true bounds, either lost or enjoyed not that which of right belonged to them.

(7) *Concessimus etiam et dedimus omnibus liberis hominibus regni nostri, &c.*] These words (*omnibus liberis hominibus regni*) doe include all persons ecclesiasticall and temporall incorporate politique or naturall, nay they extend also to villeines, for they are accounted free against all men saving against the lords.

(8) *Has libertates subscriptas.*] Here it is to be observed that the aforesaid clause that concerned the church onely, is in favour of the church generall without any restraint, but this clause that concernes all the king's subjects hath a restraint by reason of this word (*subscriptas*) which restraineth *libertates* to the 38. chapters of this great Charter.

(9) *Hæredibus.*] At this time *hæredes* were taken for *successores*, and *successores* for *hæredes*.

(10) *De nobis.*] In this place these words are not inserted to make a legall tenure of the king, but to intimate that all liberties at the first were derived from the crowne.

^a Note that courts of justice are also called *libertates*, because in them the lawes of the realme *quæ liberos faciunt*, are administred.

^a 18. E. 2. Proc.
205. 9 E. 3. 30.
24. E. 3. 44.
25. E. 3. 44.
29. E. 3. 44.
32. E. 3. Proces
58. 34. E. 3.
Scir fac. 153.
45. E. 3. 6.
47. E. 3. 14.
21 H. 6. 16.
Regis. judic. 62.
Artic. Cler. c. 9.

Marlebr. c. 10.
Briton. f. 19. B.
Fleta. li. 2. c.
45. Rot. brevi.
an. 2. R. 2.
part 2. m. 8.

Litt. sect. 189.

See the statute
of 34. E. 1. de
tallagio non
conc. cap. 4.
which is more
general.

[5]

^a Mich. 17. E.
1. in Com.
banc. rot. 221.
leic. see the
first part of the
Institut. sect. 1.

C A P. II.

S*I quis comitum, vel baronum (1) nostrorum, sive aliorum tenentium de nobis in capite (2) per servitium militare (3), mortuus fuerit, et cum decesserit, hæres ejus plenæ ætatis (4) fuerit, et relevium nobis debeat, habeat hæreditamentum suum per antiquum relevium (5), scilicet, hæres, vel hæredes (6), comitis, de com' integro, per centum libras, hæres vel hæredes baronis, de baronia integra; per centum marcas, hæres vel hæredes militis, de feodo militis integro, per centum solidos ad plus (7). Et qui minus habuerit, minus det, secundum antiquam consuetudinem feodorum (8).*

I*F any of our earls or barons, or any other, which hold of us in chief by knights service, die, and at the time of his death his heir be of full age, and oweth to us relief, he shall have his inheritance by the old relief; that is to say, the heir or heirs of an earl, for a whole earldom, by one hundred pound; the heir or heirs of a baron, for an whole barony, by one hundred marks; the heir or heirs of a knight, for one whole knights fee, one hundred shillings at the most; and he that hath less, shall give less, according to the old custom of the fees.*

(7 Rep. 33. 9. 124. 40 Ed. 3. f. 9. 1 Inst. 76. a. 83. b. 106. a. 3 Bulst. 325. Bract. 84. a. altered by 12 Cap. 2. c. 24. which takes away Knight's Service, &c.)

Rot. Parliam.
anno 11 E.
h. 5. fo. 1. in
casu principis.

Rot. Pat. 8 R.
2.

Rot. Pat. 18 H.
6. 12 Febr.

Bract. lib. 1.
fol. 5. b. Fleta
lib. 1. cap. 5.
Briton 68. b.

Bract. ubi supra.

Ad. Attic. Ep.
5. Inquis. 40.
E. 3.

Inter record. in
Turri 27 Aug.
5 H. 4. the
Earle of Nor-
thumb. Case,
&c.

(1) *Si quis comitum vel baronum.*] At this time there was never a duke, marquess, or viscount in England, for if there had been, they had (no doubt) been named in this chapter: the first duke that was created since the conquest, was Edward the Black Prince, in 11 E. 3. Robert de Vere earle of Oxford, was in the 8. year of Richard the second, created marquess of Dublin in Ireland, and he was the first marquess that any of our kings created.

The first viscount that I finde of record, and that sate in parliament by that name, was John Beaumont, who in the 18. yeare of H. 6. was created viscount Beaumont.

Comites.] *Dicuntur comites, viz. quia in comitatu sive à societate nomen sumpserunt, qui etiam dici possunt consules à consulendo: Reges enim tales sibi associant ad consulendum et regendum populum Dei, ordinantes eos in magno honore, et potestate, et nomine, quando accingunt eos gladiis, ringis gladiatorum, &c. gladius autem significat defensionem regni et patriæ.*

Barones.] *Sunt et alii potentes sub rege qui dicuntur barones, hoc est, robur belli; and where some have thought that baro is no Latin word, we find it in Tullies Epistles, apud patronem, et alios barones te in maxima gratia posui. Galfridus Cornwall tenet manerium de Burford de rege, per servitium barniæ, but it is to be understood, that if the king give land to one and his heirs, tenend' de rege per servitium baroniæ, he is no lord of parliament untill he be called by writ to the parliament. These which are earls and barons have offices and duties annexed to their dignities of great trust and confidence, for two purposes. 1. Ad consulendum tempore pacis. 2. Ad defendendum regem et patriam tempore belli. And prudent antiquity hath given unto them two ensignes to resemble, and to put them*

them in minde of their duties; for first they have an honourable and long robe of scarlet resembling counsell, in respect whereof they are accounted in law, *de magno consilio regis*. 2. They are girt with a sword that they should ever be ready * to defend their king and country: and it is to bee observed that in ancient records the barony (under one word) included all the nobility of England, because regularly all noblemen were barons, though they had a higher dignity, and therefore of the charter of king E. 1. in the exposition of this chapter hereafter mentioned, the conclusion is, *testibus archiepiscopis, episcopis, baronibus, &c.* So placed, in respect that *barones* included the whole nobility: and the great councill of the nobility, when there were besides earles and barons, dukes and marquesses, were all comprehended under the name *de la counsell de baronage*. Glanv. l. 9. c. 4. 5 H. 4. ubi sup.

(2) *Sive aliorum tenentium in capite.*] It is worthy of observation, with what great judgement this statute concerning reliefe is penned; for by the act of parliament called, The Assise of Clarendon, anno 10 H. 2. Anno Domini 1164, it is thus enacted; *archiepiscopi, episcopi, et universæ personæ regni, qui de rege tenent in capite habeant possessiones suas de rege, sicut baroniam, et inde respondeant iusticiariis et ministris regis, et sicut cæteri barones debent interesse curiæ regis cum baronibus, &c.* Therefore this chapter beginneth, *Si quis comitum, vel baronum;* So as (as to reliefe of an earle or baron) it is not materiall that he hath *baroniam*, unless he be noble, that is, earle or baron, and others being not noble, but holding in *capite*, shall pay reliefe according to the knights fees which he hath. See hereafter Cap. 31. who shall be said to hold in *capite*.

(3) *Per servitium militare.*] For this see the first part of the Institutes, Sect. 103, 112, 154, 157, 126, 127. whereunto you may adde this record following.

Per assisam Iohannes de Moyse, qui est infra ætatē, implacitat Thom' de Weylaund & Marg' ux' ejus pro uno Messuag. ii. molendinis, iii. acris prati, & xlii. s. red. in Eastsmithfield ext' Algate. Ipsi voc' ad war' Rad' de Berners, qui war' & dic' quod nihil clamat nisi custod. eo quod Iohannes pater dicti Iohannis tenuit de eo prædicta ten' per homag' & servic' vi. d. & inveniendi quendam hominem pro eo in turri London. cum arcubus & sagittis per quadraginta dies tempore guerræ. Iohannes dic' quod tenet ten' præd. per homagium & servitium quorundam calcariorū vel vi. d. pro omni servic'. Et sic omittendo multa ex utraq' parte manifeste patebit per verā Iur' & per Iud' Cur' quid in hac ass. terminatum fuit. Iur' dic' quod prædicta ten' tenent' de prædicto Radulpho per homagium & servic' unius paris calcariorū deauratorū vel sex den' ^a & inven' quend' hominē pro ipso Radulpho in turri Lond. cum arcub' & sagit' per xl. dies tempore guerræ in boreal' Angulo turris prædictæ pro omni servic'. ^b Et quia comperitū est, &c. quod Radulphus cognoscit in respons' quod prædict' herestenerere debet eadem ten' per prædict' homag' & servic' prædict' calcar' vel sex denar' & per serjantiā inveniendi unū hominē pro eo in præd' turri per xl. dies, & manifestè liquet quod huōdi minores serjantiæ quæ debent fieri pro Dominis suis de quibus tenent tenementa sua per alios quā seipsos nullū inde dabant custodiā cisdē Dominis, nec dare debent licet iidem Domini infra ætatē hæredū per negligentiam propinquorum parenū hujusmodi custodias occupaverint, & iste Radulphus non potest dedicere quod unquā aliquā habuit seisinam de prædict' custod' nisi per occupationem suam & negli-

Hil. 8. E. 1. in Banc. Rot. 86. Midd. Which Record is cited in the first part of the Instit. Sect. 157. in marg.

Vereditum.

^a Tr. 17. E. 1. in Banc. Rot. 29. Salop. Waalt. de Hop- tons Cafe. Acc.

^b The Judge- ment.

negligentiam parentum prædicti hæredis antecessoris sui dum infra ætatem fuit, & non alio jure. Considerat' est quod prædict' Iohannes rec' inde seif. &c. & damn' Cx. l. iv. s. vii. d. &c. Valor terr' per annum xx. l. x. d.

See 11 H. 4.
72. & 24. E. 3.
32.

[7]

See the first part of the Institutes, sect. 155. & 157. and note the diversitie between such a tenure of the king, for in that case it should be a tenure by grand-serjanty, and that grand-serjanty, for the greatest part, is to be done within the realme, and knights service out of the realme, as Littleton there saith.

(4) *Plenæ ætatis.*] See the first part of the Institutes, sect. 104.

Glanv. l. 9.
c. 4. Ockham
cap. Quod non
absolvitur. Cus-
tummer de
Norm. cap. 34.
and the Com-
ment thereupon.

(5) *Antiquum relevium scilicet, &c.*] Concerning the word *relevium*, vide 1. part Institut. sect. 103. It appeareth that the reliefe here set down, is the ancient relief, and was certain at the common law; but there had been of long time an heavy incroachment of an incertain reliefe at will and pleasure, which under a fair term was called *raisonnable relevium*, and this act had just cause to say, *per antiquum relevium*, for in the reign of H. 2. grandfather to H. 3. the king exacted an incertain reliefe, for so Glanvill saith, who wrote in his time, *De baroniis verò nihil certum statutum est, quia juxta voluntatem et misericordiam Domini Regis solent baroniæ capitales de releviis suis Domino Regi satisfacere.* And Glanvill under the name of baronies doth include earledomes also, so the reliefe of all the nobility was taken as incertain at that time, and therefore how necessary it was that the ancient reliefe should be restored is evident.

Tacitus de mo-
ribus Germa-
norum.

(6) *Scilicet hæres vel hæredes.*] Of this word (*heire*) see the first part of the Institutes, sect. 1. whereunto you may adde that which was there omitted, concerning the antiquity of descents, which the Germanes had agreeable with the ancient laws of the Britons, continued in England to this day, out of that faithfull and learned historian, who of the ancient Germanes saith; *Hæredes successoribus; sui cuique liberi, et nullu testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patru, avunculi, &c.* Wherein we observe three things. 1. That for default of children and brethren, the uncle, &c. and not the father, or any in the right line ascendent should inherit, but the collaterall onely. 2. That by the common law no testament or last will could be made of land. 3. That of ancient time *successores* were *synonyma* with *hæredes*. But in this ancient statute it is pertinently said, *hæres*, and not successor, for every bishop of England hath a barony, and so had many abbots and priors (in respect whereof they were lords of parliament) and yet they paid no reliefe, because their successors came to it by succession and not as heire by inheritance; and this act saith, *Habeat hæreditatem suam*, and they are seised in *jure episcopatus monasterii, &c. de comitatu integro et de baronia integra.* The barons in Domesday are accounted amongst the tenants in chiefe. Vide Glanv. lib. 9. cap. 6. Magna Charta cap. 31.

Braet. lib. 2. fol.
76. a. 34. 16
E. 3. esch unge
2. 20. E. 3.
Assise. 122. &
tit. avowr. 126.
22. E. 3. 18.
18. Ass. Pl. ult.
24. E. 3. 66.

It is to be understood that of ancient time (as it evidently appeareth by this chapter, and by our books) every earledome and barony were holden of the king in *capite*, which proveth that both the dignities of the earle and the baron, and the earldome and barony were derived from the crown. ^a And is to be known that the fourth part of the yearly value of an earledome, a barony, and the living of a knight, was the ancient reliefe that this chapter speaketh

speaketh of. And for that of ancient time, ^b a knights living was esteemed at 20l. per ann. (which in those days was sufficient to maintain the dignity of a knight) his ancient ^c relief was 5l. which is the fourth part of his living by one year.

The yearly value of a barony was to consist of 13 knights fees, and a quarter, which by just account amounted to 400 marks by the year, therefore his relief was as is here set down 100 marks.

See an ancient manuscript intituled, *De modo tenendi parliamentum, &c. tempore Regis Edwardi filii Regis Etheldredi, qui quidem modus fuit per discretiores regni corā Willielmo Duce Normannorū et Conquestore et Rege Angliæ ipso conquestore hoc tempore præcipiente rectiat³ et per ipsum approbat³, &c.* Of the authority and antiquity whereof you may reade in the fourth part of the Institutes, cap. of the Court of Parliament, *Et hic infra.*

Now every earledome consisted of the value of an entire barony and an halfe, which amounted to 20. knights fees amounting to 400l. per annum, and therefore his ancient reliefe here called *Antiquum relevium*, being the fourth part of the yearly value of his earledome was 100 l. In that excellent charter which king H. I. made on the day of his coronation, *Communi concilio et assensu baronum regni Angliæ*, amongst other things it is thus contained, *Omnes malas consuetudines, quibus regnum Angliæ opprimebatur, inde aufero, quas malas consuetudines exinde suppono. Si quis baronum meorum, comitum, siue aliorum, qui de me tenet, mortuus fuerit, hæres suus non redimet terram suam, sicut faciebat tempore fratris mei, sed legitima et iusta relevatione relevabit eam, sicut homines baronum meorum legitima et iusta relevatione relevabunt terras suas a dominis suis, &c. Legem* * *regis Edw. vobis reddo cum illis emendationibus, quibus pater meus emendavit consilio baronum suorum.*

By this charter it appeareth, 1. that there was a lawfull and just reliefe, to bee paid by the earle, and baron, which implyeth a proportionable reliefe according to the value of the living, by reason of this word (*Iusta*) which cannot be intended of an uncertaine reliefe, but of the just reliefe, upon the computation of so many knights fees contained in the *Modus*, whereunto this charter hath relation. 2. It appeareth that there was an unjust reliefe, in the time of William Rufus his brother, which upon search we have found in an ancient manuscript in the librarie of arch-bishop Parker, which we have seene, and will transcribe, in that language that we finde it.

De releefe al cunte que al Roy asert 8. chivals enfrenes, & ensebees, & 4. Hauberts & 4. Harwmes & 4. escues, & 4. launces, & 4. espees les autres, & 4. chaceurs & 4. palestres à freins et a chevestres.

De releefe a barun 4. chivals les 2. enfrenes & enseeles & 2. hauberts & 2. harwmes & 2. escus, & 2. espees & 2. launces, & les autres 2. chivals un chaceur & un palfrey a freins & a chevestres.

De releefe a vavassur a son lige senior doit estre quite per le chival son pier, tiel come il avoit jour de son mort, & per son harwme, & per son escu & per son haubert, & per son lance, & sil fuit disaparoile, que il noust chival ne arme juste quite per C. sol.

Le relief al villain le meliour avoir que il averad 2. chivals, 2. boefs, 2. vaches durrad a son seignior, & puis sont tous les villains in frankpledge.

In K. Canutus time, *Relevatio comitis fuit 8. equi, 4. sellati, 4. infellati,* Inter leges Ca. nuti. cap. 97.

nontenure 16.
46 E. 3. forseit
18. 10 H. 7.
19 a.
^a See the first
part of the In-
stitutes, sect 95.
Camden Brit.
122. Acc.
^b 1 E. 2. cap.
1. 7 H. 6. 15.
M. 2 Jac. lib.
11. Me. calf's
Case, fol. 33.
34.

[8]

* 1. Edw. filij
Etheldredi.

* CC. mar.

* i. Baronis.

4. infellati, & galeæ 4. & lorice. 4. cum 8. lanceis, & totidem scutis, et gladii. 4. et * CC. mancæ auri.

Postea * thani regis, qui ei proximus sit, 4. equi, 2. fellati, 2. non fellati. 2. gladii. 4. lancee, et totidem scuta, et galea cum lorica sua, et 50. mancæ auri.

Et mediocris thani equus cum apparatu suo et arma sua et halstang in West-sæxa, &c.

Lastly, this chapter of Magna Charta is but a restitution and declaration of the ancient common law, and that *antiquum relevium* of the earle, and baron was certaine, so now joyning both together, this certaine reliefe here set downe is *legitimum, justum & antiquum relevium*, mentioned in the *Modus, &c.*

It is said that there be ancient precedents in the exchequer, that he that held by a dukedome, which being valued at two earles livings, should pay according to the proportionall and just fourth part of his living by yeare, 200. li. And a marques that held by a marquesdome, who should have two baronies, should pay for his reliefe 200. marks. What the value of the living of a viscount should be, I have not heard, but certaine it is he should pay the fourth part of the yeerely value of his viscountesdome.

But all this is to be intended, where the king granteth a Duke-dome, marquesdome, earledome, viscountesdome, or barony to hold, as here it is spoken, *de nobis in capite per servitium militare, viz. De comitatu integro & de baronia integra, & qui minus habuerit, minus det secundum antiquam consuetudinē feodorū.*

But in some cases the heire of an earle, or a baron may pay the reliefe expressed in this statute, albeit he hath not so many knights fees, as is above said: for if upon the creation of the earle the king did grant any mannors, lands, or annuity *per comitatum, & nomine comitis*, or *sub nomine & honore comitis*, or the like, he should pay, C. li. for reliefe, and so of the baron, *mutatis mutandis*, for a speciall reservation may derogate from the common law.

But otherwise it is, if the mannors, lands, or annuity be granted unto the earle, *ut idem comes statum & honorem comitis melius manutenere & supportare possit*, or *ad sustinendum nomen et onus*, or the like; for then the earle holdeth not *per comitatum*, or *nomine comitis*.

But now the ancient manner of creation is altered, for now, when the king creates a duke, a marques, an earle, a viscount, or baron, he seldome creates a dukedome, marquisdome, earledome, &c. *ad sustinendum nomen et onus, viz.* to grant him mannors, lands, tenements, &c. to hold of him in chiefe, for commonly upon creations the king grants to them created an annuity; and therefore at this day noblemen doe pay such reliefes, as other men use to doe, in respect of their tenures, for as the heire of a knight shall not pay reliefe, unlesse he have a knights fee, &c. so the heire of an earle, or baron, shall not pay reliefe by this great charter, unlesse he hath an earledome, or baronie, as is aforesaid.

(7) *Ad centum solidos ad plus.*] And this was the ancient reliefe for a knights fee, and so it was holden in the reigne of H. 2. for Glanvil saith, *dicitur autem rationabile relevium alicujus juxta consuetudinem regni de feodo unius militis per centum solidos*, so as the fee of a knight at that time was certaine, viz. the fourth part of his living *per annum*, and so ought, as appeareth, the relief of the nobility to have beenc in certainty, though they were not permitted to have it so,

[9]

Com. Mich. 14.
E. 3. rot. 8. ex
pte rem. Thes.
Com. Hil. 25.
E. 3. rot. 4. ex
pte rem. Thes.
Com. Hil. 7.
H. 4. rot. 2. rot.
cart. 36 E. 3.
nu. 8. the Earle
of Cambridge's
case.

6. H. 8. Dier. 2.
17. E. 2. prer.
regis cap. 3.

Glanvil lib. 9.
cap. 4. lib. 9.
fol. 124 An-
tony Lowe's
case. Stat. 1. E.
2. de militibus.
1. part of the
Institut. 103.
112. 113.

so, which favored of the power of a conqueror to keepe the nobility under, or to make himselfe the more amiable to them.

(8) *Secundum antiquam consuetudinem feodorum.*] This is observable, that these certaine and proportionable rates are according to the ancient custome of reliefes.

* A knight holds land by grand serjantie, he is not within this statute, and therefore shall not pay the reliefe of a knight declared by this act, but the heire being of full age at the decease of his ancestor, shall pay the value of his lands for one yeere which is his *primer seisin*.

But here it is demanded, seeing Littleton saith, that tenure by cornage, if it be of any other lord then the king, is knights service, what releefe the heir of such a tenant shall pay, or whether he shall pay any reliefe at all. Littleton in the same place saith, that tenure by cornage draweth unto it ward, and marriage, and speaketh nothing of reliefe, and by this act reliefe is to be payed according to the quantity of the knights fee, viz. *De feodo militis integro per centum solidos & qui minus habuerit, minus*: but a tenure by cornage hath no such quantities, *nec suscipit majus & minus*, and therefore tenure by cornage, though it be knights service, is not within this statute; hereof you may read a record to this effect.

Inter Iohannem Craistoke querentem versus Idoneam de Leybourne quæ distrinxit ipsum per averia pro relevio dando, pro terris in Dunston Brampton yanene which Efeclyve, et Boulton, quæ valent C. li. per ann. quæ tenet de ea per homagium et cornagium. Et ipse dicit quod talis est consuetudo patriæ de Westm. quod hæredes post mortem antecessorum suorum debent relevare terras suas dominis de quibus, &c. scilicet solvendo pro relevio quantum terræ valent per annum, quæ de ipsis dominis tenentur, nisi de minori ipsis dominis possunt satisfacere, unde ipsa advocat captionem pro relevio secundum prædictam consuetudinem, &c.

Iohannes negat talem esse consuetudinem, sed concedit, quod tenet tementa prædicta per cornag' xxv. s. vi. d. et dicit quod antecessores sui prius duplicarunt antecessor. ipsius Idoneæ solvendo Li. s. Ipsa dicit quod cum Iohannes cogn', quod ipse tenet prædicta ten' de ipsa per cornagiū, ad quod huiusmodi relevium mere est accessor, ratione conjuet' prædictæ. Et dic' quod idem Iohannes exigit tale relevium versus tenentes suos in eadem patriâ à tempore quo non, &c. Et de consuet' uterq', pon' se super patriam. Ideo ven' Iur' in Cra. S. Iohannis Baptistæ, &c. Insuper Idonea dic' quod duplex est tenura in Com' Westmerl. scilicet, una per Albā firmā, et alia per Cornagium. Et quod tenentes per Albam firmam post mortem antecessorum suorum debent duplicare firmam suam tantum. Et tenentes per Cornagium post mortem antecess. suorum tenentur reddere valorem terrarum suarum unius anni. Et Iohannes è contra dic' quod consuetudo patriæ est quod hæredes non solvant nisi duplicando Cornagium, &c.

Bracton li. 2. fo. 84. cap. 36. nu. 2. *Et imprimis de feodo militari quale sit rationabile relevium antiquum de feodo militari distinguitur in carta libertatum, cap. 2. &c.* And in the same chapter, nu. 7. saith thus, *De serjantiis vero nihil certum exprimitur, quid vel quantum dare debeant hæredes idè juxta voluntatem Dominorum Dominis satisfaciant pro relevio, dum tamen ipsi Domini rationem & mensuram non excedant.*

Certain it is, that he that holdeth by castle-guard shall pay no escuage, for escuage must be rated according to the quantity of the knights fees,

154. 157. vide Bracton ubi supra. Britton cap. 69. Fleta. l. 3. c. 17.

* 11. H. 4. 72. b. 1. part of the Institut. sect. 154. 157. Litt. sect. 156.

Mich. 18. E. 1. in Banco rot. 84. Westmerl. & eodem anno. rot. 158. Cumberland. 10. Swinborne case acc. cornagium.

[10]

Alba firma Cornogium.

Bract. l. 2. fo. 84. vide Glanv. l. 7. cap. 9. Fleta. li. 3. cap. 17. Brit. fo. 177. 178, &c.

Litt. sect. 111.

Lit. sect. 97.

Lit. sect. 111.

fees, as for a whole knights fee or half a knights fee, &c. and of that nature is not castle-guard. Littleton treating of castle-guard, saith, that in all cases where a man holdeth by knights service, such service draweth to it ward and marriage, and speaks not there of relief.

CAP. III.

SI autem hæres (1) alicujus talium fuerit infra ætatem, dominus ejus non habeat custodiam ejus, nec terræ suæ, antequam homagium ceperit (2); et postquam talis hæres fuerit in custodia, cum ad ætatem pervenerit (scilicet xxi. annorum) habeat hæreditatem suam sine relevo, & sine fine, ita tamen quod si ipse (dum infra ætatem fuerit) fiat miles (3), nihilominus terra remaneat in custodia dominorum suorum (4), usque ad terminum prædictum.

BUT if the heir of any such be within age, his lord shall not have the ward of him, nor of his land, before that he hath taken of him homage. And after that such an heir hath been in ward (when he is come to full age) that is to say, to the age of one and twenty years, he shall have his inheritance without relief, and without fine; so that if such an heir, being within age, be made knight, yet nevertheless his land shall remain in the keeping of his lord unto the term aforesaid.

(Hob. 46. Fitz. Gard. 136, 142, 156. 15 Ed. 4. f. 10. Plowd. f. 267. 6 Rep. 73. 8 Rep. 173. 12 Rep. 81. F. N. B. fo. 269. Altered by 12 Car. 2. c. 24. which takes away wardship &c. by reason of tenure.)

35 H. 6. 52.

(1) *Hæres.*] This statute is onely to be intended of an heire male, whereof *hæres* is derived: and who shall be *hæres*, &c. See the first part of the Institutes, lib. 1. sect. 1, 2, 3. *Custumier de Norm.* 99. and the expositions upon the same.

See the Custumier de Norm. cap. 29. and the Comment upon the same. & cap. 32. & le Latine. Com. fol. 48. b.

(2) *Antequam homagium ceperit.*] For homage see the first part of the Institutes, sect. 85. and it is to be observed that in England and France it is called *Homage*, *Homagium*, and in Italy *Vassalagium*.

Some have thought that these words are to be understood that the heire within age shall not be in ward untill the lord hath taken the homage of some of the auncesters of the ward, so as the auncester of the heire may die in the homage of the lord: for in a writ of ward brought by the lord, it is a good plea to say that the auncester died not in his homage, and the statute saith not *Antequam homagium suum ceperit*, but *homagium* generally; and, say they, if the lord should receive homage of the heire, he should not be in ward at all.

[II]
16 E. 3 Relief
6. & 10.

But this is not the right intendment of these words, but the statute meant that the homage should be taken of the heire himselfe, and that for the benefit of the heire, and so doth it appear by

^a Brac. 1. 2. fo. 41, 71, 81, 89, 252. Brit. fol. 171. Fleta, li. 1. ca. 9. Mirror, ca. 9. § 2. Glanv. lib. 9.

^a our old books that wrote soone after this statute, and *contemporanea expositio est fortissima in lege*, and so do the words themselves of this law import, and the reason thereof is notable, which was, that before the lord should have benefit of wardship, he should be bound to two things; ^b 1. To warrant the land to the heir, and to that end the heir might have a writ, *De homagio capiendo*; 2. To acquit him

*

from

from service and other duties to be done and paid to all other lords, both which the lord was bound to do (e as the law was then holden) if the lord accepted homage *de droit* of his tenant, (in such sort as the lord is, if he receiveth homage *auncestrel* at this day) but otherwise it is of homage in fait; ^d *Homagium est juris vinculum, quo quis astringitur ad warrantizandum, defendendum, & acquietandum tenentem suum in seiscina versus omnes per certum servitium in donatione nominatum & expressum; & etiam vice versa, quo tenens astringitur ad fidem Domino suo servand. & servitium debitum faciend.* ^e We have an ancient manuscript of a case adjudged in a writ of customs and services betwene Alexander of Poulton, and Robert de Norton, that homage is of an higher nature to divers purposes then escuage. 1. ^f For that homage bindeth to warranty, which escuage doth not. 2. Homage is so solempne as that it cannot be done again as long as the tenant that made it liveth, but escuage may be given every other year. ^g And Littleton saith that homage is the most honourable service, and humble service of reverence, and yet it is true that escuage taking it for service, draweth to it homage.

^h But at the common law, if a man holding land by knights service, had made a gift in frank-marriage, and the donee had died his heir within age, the heir should be in ward before any homage received, *Quia dominus non potest capere homagium usque ad tertium haredem*, and this statute is to be intended where homage was to be received by law, yet did the tenant in judgement of law die in the homage of the lord, or otherwise he could not be in ward, a case worthy of great consideration.

ⁱ But after when it was resolved for law, and so held to this day, that homage of it selfe doth not binde the lord to any warranty or acquittall, unlesse it were homage *auncestrell*, which either is worne out, and very rare in England at this day; then according to the old rule, *Cessante ratione legis cessat ipsa lex*; the heir cannot binde the lord to receive homage in this case, but if the tenure be by homage *auncestrell* there the lord shall not have the custody of body or land before he receiveth homage of the heire, for that homage bindeth him to warranty and acquittall, and consequently within the reason of this law.

^k Here is to be noted that one within age may doe homage, but he cannot do fealty because that is to be done upon oath, *Hoc observato, quod si minor homagium fecerit nullum tamen juramentum fidelitatis, antequam ad etatem pervenerit, præstabit.* See more concerning this matter 1. part. Institut. lib. 2. cap. Homage and Fealty.

(3) *Fiat miles.*] Be made a knight; and his tenure of service is called *Servitium militare*, knights service, ¹ and therefore if the king create the heire within age, a duke, a marquisse, an earle, a viscount or a baron, yet he shall remain in ward for his body, but if the heire of a duke, or of any other of the nobility be made a knight, he shall be out of ward for his body. If the heire in ward be created a knight of the garter, a knight of the bathe, a knight banneret, or a knight bachelor, he shall be out of ward for his body for that he is a knight, and somewhat more, and the statute speaketh generally, unlesse a knight, and therefore within the words and meaning of this law, and the soveraigne of chivalry hath adjudged him able so doe knights service.

cap. 1. & 6. 13
E. 1. gard. 136.
31 E. 1. gard.
155.

^b Trin. 4 E. 2.
fo. 65. b. in li-
bro m.o. Wil-
liam St. Quin-
tin's case. Ho-
mage auncestrel
only bindeth to
warranty, but
homage in fait
bindeth to ac-
quittall.

See the first
part of the In-
stitutes, sect.
143, fol. 101.
Verb & ad re-
ceive homage.

^c Tr. 9. E. 2.
Ubi supra.

^d Bract. fol. 78.
Britt. & Fleta
ubi supra. 47 E.
3. gar. 99.
Temp. E. 1.
garr. 90.

^e M.S. in temp.
E. 1.

^f See the first
part of the Insti-
tutes, sect. 149.

^g Lit. sect. 85.
sect. 99.

^h 13 H. 3. gar.
42.

ⁱ 35 H. 6. gard.
72. 14 H. 7. 11.
Lit. sect.

^k Brac. l. 2. fo.
79.

See the first part
of the Institutes.
Lit. lib. 2. cap.
Homage & Feal-
ty.

¹ Lib. 6. fol. 73.
Sir Drue Dru-
ries case. 15
E. 4. 10. Pl.
Com. Ratcliffe's
case. See here-
after *verbo re-
maneat.*

And

See Sir Drue Druries case, *ubi supra*.

Lib. 8. fol. 171.
Sir Henry Constable's case.
15. E. 4. 10. Pl. Com. 267. 2 E. 6. tit. gard. Br. Sir Anthony Brown's case; Sir Drue Druries case. *Ubi supra*. Pl. Com. Ratcliff's case

And this word *Fiat*, be made, proveth that knighthood ought to be by creation or making, and cannot be by descent.

^m But albeit the heir be made a knight within age, yet is he not freed of the value * of his marriage, for that was vested before in the king, or other lord, and the king being sovereign of chivalry hath adjudged him of full age, that is, able to doe knights service, to this intent, to free his body from custody, but neither to barre the king or other lord of the value of the marriage, no more then if he had attained to his full age of 21 years.

(4) *Remaneat in custodia dominorum suorum.*] This word (*remaneat*) implieth that this statute is to be understood onely, where the heir after he be in ward is made knight within age, for when the heire apparent is made knight within age in the life of the auncester, and the auncester dieth, his heir within age, he shall be out of ward both for body and land, because the sovereign of chivalry hath adjudged him of full age, and able to do knights service in the life of his auncester, so as in that case no title of wardship did ever accrew, and there can be no *remanere* or residue, but of that thing that had his essence or beeing.

C A P. IV.

CUSTOS (1) *terræ hujusmodi hæredis, qui infra ætatem fuerit, non capiat de terra hæredis, nisi rationabiles exitus (2), et rationabiles consuetudines (3), et rationabilia servitia (4), et hoc sine destructione, et vasto hominum et rerum (5). Et si nos commiserimus (6) custodiam alicujus talis terræ vic', vel alicui alii, qui de exitibus terræ illius nobis debeat respondere, et ille de custodia illa, destructionem, vel vastum fecerit: nos ab eo capiemus emend' (7), et terra committatur duobus legal' et discretis hominibus de feodo illo, qui de exitibus terræ illius nobis respondeant, vel illi cui nos illam assignaverimus. Et si dederimus, vel vendiderimus custod' alicujus (8) talis terræ, et ille inde destructionem fecerit, vel vastum, amittat illam custod' (9), et tradatur duobus discret' et legal' hominibus de feodo illo, qui similiter nobis respondeant, sicut prædict' est.*

THE keeper of the land of such an heir, being within age, shall not take of the lands of the heir, but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods. And if we commit the custody of any such land to the sheriff, or to any other, which is answerable unto us for the issues of the same land, and he make destruction or waste of those things that he hath in custody, we will take of him amends and recompence therefore, and the land shall be committed to two lawful and discreet men of that fee, which shall answer unto us for the issues of the same land, or unto him whom we will assign. And if we give or sell to any man the custody of any such land, and he therein do make destruction or waste, he shall lose the same custody; and it shall be assigned to two lawful and discreet men of that fee, which also in like manner shall be answerable to us, as afore is said.

(Rast. pl. 693. Fitz. Wast. 15, 24, 138, 146. 1. Inst. 54. a. 12 H. 4. f. 53. 6 Ed. 1. c. 5. 28 Ed. 1. stat. 3. c. 18 14 Ed. 3. stat. 1. c. 13. 36 Ed. 3. c. 13. See 12 Car. 2. c. 24. which renders obsolete the three last mentioned acts restraining escheators from waste.)

(1) *Custos*

(1) *Custos.*] A keeper, some derive the word à cura & sto, quia *custos est is cui cura rei stat custodiend.*; and thereupon sometime he is called *curator*, in French he is called a *gardien*, so as his name *custos* doth put him in minde of his office and duty, that is not onely to keep and preserve the lands and tenements of the ward committed to his custody in safety, but also to educate and bring up his ward virtuously, and to advance him in marriage without disparagement. Vide 1. part Institut. Sect. 103. of the cause and end of wardship; and see the 4. part of the Institut. cap. Court of Wards and Liveries.

(2) *Rationabiles exitus.*] *Exitus* is derived *ab exeundo*, and signifieth the rents and profits issuing out or coming of the lands or tenements of the ward, which must be taken by the *gardien* in reasonable manner, and therefore to *exitus*, *rationabiles* is added, for that nothing that is unreasonable is allowed by law.

(3) *Rationabiles consuetudines.*] That is, things due by custome or prescription, and appendant or appurtenant to the lands or tenements in ward, as advowsons, commons, waife, straie, wreck, and the like; also the reasonable customes, fines, &c. of tenants in villenage, or by copy of court-roll where fines be incertain: for though the customes, duties, fines, or the like be incertaine, yet if that which is exacted or demanded be unreasonable, it is against the common law. For this word (*consuetud.*) and the divers significations thereof, see hereafter cap. 30.

(4) *Et rationabilia servitia.*] This also, as appeares by Glanvill that wrote in the reign of H. 2. was the common law of England, that incertain services and aides ought to be reasonable; for, saith he, the lord may *rationabilia auxilia de hominibus suis inde exigere, ita tamen moderate secundum quantitatem feodorum suorum et secundum facultates, ne minus gravari inde videantur, vel suum contenenentum amittere*; and that which he speaketh there of aids, is to be applied to all incertain services, customes, fines, or duties.

But it may be demanded, how and by whom shall the said reasonableness in the cases aforesaid be tried? this you may reade in the first part of the Institutes, sect. 69.

(5) *Et hoc sine destructione et vasso hominum et rerum.*] For these words, destruction and waste, see the first part of the Institutes, sect. 67. and the statute of Gloc. cap. 5.

(6) *Et si nos commiserimus, &c.*] For this word *commiserimus*, vide the first part of the Institutes, sect. 58. & 531. Here the committee of the king is taken for him to whom the king committeth the custody of the land to one or more; by this word *commisimus*, reserving a rent, *Quamdiu quis alius plus dare voluerit*, and there the king remain *gardien*.

(7) *Nos ab eo capiemus emenda.*] And this may be upon an office found, or by writ directed to the sheriffe to this effect, *Quia datum est nobis intelligi, &c.*

(8) *Et si dederimus vel vendiderimus alicui custodiam, &c.*] In this case the king graunteth, or selleth the very custody it selfe, so as the graantee or vendee becommeth guardian in fact: and that this distinction between the committee and graantee was by the common law, hear what Glanvill saith, *Si vero Dominus Rex aliquam custodiam alicui commiserit, tunc distinguitur utrum ei custodiam pleno jure commiserit ita quod nullum inde reddere computum oportet ad Scaccarium, aut aliter:*

Braet. lib. 7. fol. 87. W. 2. ca. 39. Flet. li. 6. ca. 61. 5 E. 2. 6. 24 E. 3. 28, 29.

Brac. li. 2. fo. 87.

[13]

Glanv. li. 9. c. 8. W. 1. cap. 31. 25 E. 3. cap. 11.

Contenenentū.

Marleb. cap. 17. Mirror. cap. 5. § 2. li. 4. fol. 57.

Reg. fo. 72, 73. Brac. li. 2. fo. 47. lib. 4. fol. 317. 20 H. 3. Waste 138. 40 Affis. Pl. 22. lib. intrat. Rast. 616.

Glanv. li. 7. c. 10.

fi

si vero plene ei custodiam commiserit, tunc poterit, &c. negotia sicut sua recte disponere. King H. 7. graunted a ward to the dutches of Buckingham, *quam diu in manibus suis fore contigerit*; and afterwards the king made a speciall livery, as by law he might, to the heir within age, and it was adjudged, as justice Frowick reported, that the duches was without remedy; but otherwise it had been if the graunt were *durante minore etate heredis*, or *durante minore etate et quamdiu in manibus nostris*, &c.

7 E. 3. 12, 13.
3 E. 2. Waste 3.
Registr. 72.

12 H. 4. 3.
F. N. B. 59. e. &
60. c. Vide
notabile recordum,
M. 32 E. 1
Coram Rege.
Rot. 76. Dub-
lin. See here-
after in the Ex-
position upon
the Statute of
Gloc. c. 5.

[14]

Bracton lib. 4.
fol. 285. 316,
317.
Gloc. cap. 5.
Dier 28 H. 8.
fol. 25. Britt.
fo. 33, 34.
* W. 1. cap. 21.
Gloc. cap. 5.
Artic. sup. cart.
cap. 18. 14. E.
3. cap. 13. 36.
E. 3. cap. 13.

Fleta. lib. 1. cap.
10. § Solent.
* Nota, the
cause of altera-
tion by act of
parliament.
Mirror cap. 1.
c. 9. § En auter
manr acc. Brit-
ton. cap. 66. fol.
167. b. acc.

But here it may be materially demanded, what if the committee or grauntee doth waste, and the king during the minority taketh no amends, what remedy hath the heir after his full age? The answer is, that he shall have an action of waste, and that by order of the common law: and then it is further doubted and demanded, what shall the heir then recover, for the wardship cannot be lost, seeing the heir is of full age, neither by this statute nor by the statute of Gloc. To this the answer is very observable, that seeing that the wardship cannot be lost, and the waste, being to the heirs dishe- rison, ought not to remain unpunished, that the heir shall recover treble damage, for that penalty is annexed to the action of waste; and therefore if an action of waste were given against tenant in tail *apres possibilitie*, generally the plaintife shall recover treble damages, because they are annexed to this suit. But if the king doe take amends, then the heir at full age shall have no action of waste.

(9) *Amitat custodiam.*] This is understood of the land, and not of the body, for the words be *tradatur duobus*, &c. *qui de exitibus terre nobis inde respondeant.*

* *Nota*, since this statute of *Magna Charta* divers other statutes against waists and destructions in the lands of wards have been made.

At the making of this statute, the king had not any prerogative in the custodie of the lands of idiots during the life of the idiot, for if he had had, this act would have provided against wast, &c. committed by the committee, or assignee of the king to be done in their possessions, as well as in the possessions of wards, but at this time the guardianship of idiots, &c. was to the lords and others according to the course of the common law. And idiots from their nativity were accounted alwayes within age, and therefore the custodie of them was perpetuall so long as they lived, for that their impotencie was perpetuall. And the lord of whom the land was holden, had not a tenant that was able to doe him service. And therefore within the reason of a custodie of a minor or of an heir within age in case of wardship. And this appeareth by Fleta, *Solent tutores idiotarum et stultorum cum corporibus eorum perpetuo, quod licitum fuit et provisum, eo quod se ipsos regere non noverint*, * *nam semper judicabantur infra etatem: vel quia verumq; plures per hujusmodi custodiam exheredationes compatiebantur, provisum fuit, et comuniter concessum quod Rex corporu et hereditatu hujusmodi idiotarum et stultorum sub perpetuis custodiam obtineret, dum tamen a nativitate fuerint idiotæ et stulti; secus autem si tardæ a quocunque Domino tenuerint, et ipsos maritaret et ex omni exheredatione salvaret hoc cum adjecto quod domini feodorum et aliis quorum interfuerit ut servitiis, redditibus et custodiis usque ad legitimam etatem secundum conditionem feodorum, releviis et hujusmodi nihil juris deperiret.*

But then it is demanded, when was this prerogative given to the king? Certaine it is, that the king had it before statute of

17 E. 2. *de prerogativa regis*, for it appeareth in our bookes, that the king had this prerogative, *anno* 3 E. 2. And before that, it is manifest that the king had it before Britton wrote in the raigne of E. 1. as you may read in his booke.

Britton, cap. 66.
fol. 167. b.

Brac. l. 5. c. 21. 2.
Stanf. Prerog.
ca 9. fol. 33. 34.

And it is as cleare, that when Bracton wrote (who wrote about the end of the reigne of H. 3. that the king had not then this prerogative.

And therefore it followeth, that this prerogative was given to the king E. 1. before that Britton wrote, by some act of parliament, which is not now extant. And it appeareth by the Mirror of Justices agreeing with Fleta, that this prerogative was granted by common assent, *vide* lib. 4. Beverley's case, fol. 126.

C A P. V.

CUSTOS autem quamdiu custodiam terræ hujusmodi habuerit, sustentet domos, parcos, vivaria, stagna, molen- dina, &c. ad terram illam pertinentia, de exitibus terræ ejusdem, et reddat hæredi cum ad plenam ætatem perve- nerit, terram suam tot' instauratam de carucis, et omnibus aliis rebus, ad mi- nus, sicut illam recepit. Hæc omnia observentur de custodiis archiepiscopa- tum (1), episcopatum, abbatiarum, prioratum, ecclesiarum, et dignita- tum vacantium, quæ ad nos pertinent, except' quod custod' hujusmodi vendi non debent.

THE keeper, so long as he hath the custody of the land of such an heir, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the same land, with the issues of the said land; and he shall deliver to the heir, when he cometh to his full age, all his land stored with ploughs, and all other things, at the least as he received it. All these things shall be observed in the custodies of archbishopricks, bi- shopricks, abbeys, priories, churches, and dignities vacant, which appertain to us; except this, that such custody shall not be sold.

(10 H. 7. f. 30. 3 Ed. 1. c. 21. 36 Ed. 3. c. 13.)

That this was the common law appeareth by Glanville, who saith, *Resituere autem tenentur custodes hæreditates ipsi hæredibus instauratas et debitis acquietatas juxta exigentiam temporis custodiæ et quantitatis hæreditatis.*

[15]

Glanvil, lib. 7.
cap. 9.
Fleta, li. 1. c. 11.
10 H. 7. 6. &
30.
See the 1. part
of the Institutes,
sect. 67.
See prer. regis,
cap. 14.
W. 1. cap. 21.
Fleta, li. 1. c. 11.
14 E. 3. ca. 4. 5.
vide cap. 33.

(1) *Hæc omnia observantur de custodiis archiepiscoporum, &c.*
The custodie of the temporalities of every arch-bishop and bishop within the realme, and of such abbeyes, and priories, as were of the king's foundation, after the same became voide, belonged to the king during the vacation thereof by his prerogative: for as the spiritualities belonged during that time to the deane and chapter *de cõmuni jure*, or to some other ecclesiasticall person by prescrip- tion, or composition, so the temporalities came to the king as founder, and this doth belong to the king, being *patronus et pro- tector ecclesiæ*, in so high a prerogative incident to his crowne, as no subject can claime the temporalities of an arch-bishop, or bishop, when they fall by grant or prescription.

adjudged 21
E. 1.

II. INST.

C

But

Regulas

But as, *in omni re nascitur res quæ ipsam rem exterminat*, unless it bee timely prevented (as the worme in the wood, or the mothe in the cloth, and the like) so oftentimes no profession receives a greater blow then by one of their owne coat: for Ranulph an ecclesiasticall person, and king William Rufus his chaplain, a man *subalto ingenio*, and *profunda nequitia*, was a factor for the king in making merchandize of church livings, in as much, as when any archbishopricke, bishopricke, or monastery became void, first he perswaded the king to keepe them voide a long time, and converted the profits thereof sometime by letting, and sometime by sale of the same, whereby the temporalities were exceedingly wasted, and destroyed. Secondly, after a long time no man was preferred to them *per traditionem annuli et baculi*, by livery of season, freely, as the old fashion was, but by bargain and sale from the king to him, that would give most, by meanes whereof the church was stuffed with unworthy, and insufficient men, and many men of lively wits, and towardlinesse in learning despairing of preferment turned their studies to other professions. This Ranulph, for serving the kings turnes, was advanced, first, to be the kings chancellour, and after to be bishop of Duresme, who after his advancement to so high dignities, made them servants to his sacrilegious and simoniacall designs. King Henry the first seeing this mischiefe, and foreseeing the great inconvenience that would follow thereupon, was contented for his owne time to binde his owne hands, to the end the church now naked and bare might receive some comfort, and have meanes to provide things necessary for their profession, and calling. He thereupon at his coronation made a charter to this effect, *Quia regnum oppressum erat injustis exactionibus, ego in respectu dei et amore quem erga vos omnes habeo, sanctam Dei ecclesiam imprimis liberam fac' ita quod nec vendam, nec ad firmam ponam, nec mortuo archiepiscopo, sive episcopo vel abbate, aliquid accipiam de dominio ecclesie vel hominibus ejus, donec successor eam ingrediat, et omnes malas consuetudines, quibus regnum Angliæ opprimebatur, inde aufero*. He committed the said Ranulph then bishop of Durham to prison for his intolerable misdeeds, and injuries to the church, where he lived without love, and died without pity, saving of those, that thought it pity, he lived so long.

See this charter
at large in
Mat. Par.
See libr. ruben
in principio.

Flet. ubi supra.
14 E. 3. ca. 4, 5.
F. N. B. 59. b.

Vendi non debent.] Fleta, *ubi supra*, saith, *vendi non debent nec legari*; yet the king may commit the temporalities of them during the vacation, as by the statute of 14 Ed. 3. appeareth.

CAP. VI.

HÆREDES autem maritentur
absque disparagations.

HEIRS shall be married without
disparagement.

(1 Inst. 30. 20 H. 3. c. 6.)

'This is an ancient maxime of the common law: see more hereof in the first part of the Institutes, sect. 107, 108, 109:

CAP.

C A P. VII.

VIDUA post mortē mariti sui statim et sine difficultate aliqua, habeat maritiagium suū et hæreditatē suam: nec aliquid det pro dote sua, nec pro maritagio suo, vel pro hæreditate sua habenda, quā hæreditatē maritus suus, et ipsa tenuerunt simul, die obitus ipsius mariti sui: et maneat in capitali messuagio mariti sui, per quadraginta dies (1) post obitū mariti sui (2), infra quos dies assignetur ei dos (3) sua, nisi prius ei assignata fuerit, vel nisi domus illa sit castrū (4): et si de castro recesserit, statim domus ei competens provideatur, in qua possit honeste morari (5), quousque dos sua ei assignetur, secundū quod prædictum est: et habeat rationabile estoverium suum interim de communi (6). Assignetur autem ei, pro dote sua, tertia pars totius terræ mariti sui (7), quæ fuit sua in vita sua, nisi de minori fuerit dotata ad ostium ecclesiæ. Nulla vidua distringatur ad se maritandam (8) dummodo voluerit vivere sine marito: Ita tamen quod securitatem faciat, quod se non maritabit sine assensu nostro, si de nobis tenuerit, vel sine assensu domini sui, si de alio tenuerit (9). [Prærogativa Regis, cap. 4.]

A Widow, after the death of her husband, incontinent, and without any difficulty, shall have her marriage, and her inheritance, and shall give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of the death of her husband, and she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before) or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is aforesaid; and she shall have in the mean time her reasonable estovers of the common; and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his during coverture, except she were endowed of less at the church-door. No widow shall be distrained to marry herself; nevertheless she shall find surety, that she shall not marry without our licence and assent (if she hold of us) nor without the assent of the lord, if she hold of another.

(Hobart 153. Dyer, f. 76. Plow. 32. Bro. Dower, 101. Regist. fol. 175. Co. Lit. 32. b. 19 H. 6. f. 14. 17 Ed. 2. c. 4. Fitz. Dower, 194, 196. 20 H. 3. c. 1.)

It appeareth by Bracton of ancient time, that a woman being heire, sine dominorum dispositione et assensu, hæreditatem habens, maritari non potest, nec etiam in vita antecessorum de jure sine assensu domini capitalis, quod si olim fecissent, hæreditatem amitterent sine spe recaperandi, nisi solum per gratiam: bodie tamen aliam pœnam incurrunt, sicut inferius dicitur, et hoc ideo ne cogatur dominus homagium capere de capitali inimico, vel de alio minime idoneo.

Also it appeareth by the same author, quod si mulier dotem habens pro voluntate sua alicui nuberet, præter assensum warranti sui de dote, olim ex tali causa dotem amitteret, nunc tamen non amittet.

Bracton, li. 2. fol. 88.
Fleta, li. 5. cap. 23. 35 H. 6. 52.
Mat. Par. 407.

Mirroure, cap. 1. § 3.
See the 1. part of the Institutes sect. 36.

Item

Item cum semel legitime maritata fuerint, et postea viduæ, iterum non custodientur sub custodia dominorum, licet teneantur assensum eorum requirere maritandi se, &c. And herewith agreeth Glanvile, who wrote before this statute.

Glanvil, lib. 7.
cap. 12.
Fleta, lib. 3.
cap. 23.

Hereby you may see what had beene used of ancient time in these cases: but at this day widowes are presently after the decease of their husbands, without any difficulty to have their marriage (that is, to marrie where they will without any licence, or assent of their lords) and their inheritance, without any thing to be given to them; but in this branch the king is not included, as hereafter in the end of this chapter shall appeare.

Bract. li. 2. c. 40.
Britton, c. 103.
Fleta, li. 5. c. 23.

Register. 175.
F. N. B. 161.

[17]

(1) *Et maneat in capitali messuagio mariti sui per quadraginta dies post obitum mariti sui.*] And this is called her quarentine, and if the widow be withholden from her quarentine, she shall have her writ, *De quarentena habenda* to the sherife, which reciting this statute, is in nature of a commission to him, *Quod vocatis coram vobis partibus prædictis, et auditis inde earum rationibus, eidem B. C. viduæ plenam et celerem iustitiam inde fieri faciatis juxta tenorē cartæ prædictæ, ne pro defectu justitiæ querela ad nos perveniat iterata.* By force of which writ, the sherife may make proceffe against the defendant, retournable within two or three dayes, &c. and may, and ought (if no just cause may be shewed against it) speedily to put her in possession; and the reason why such speed is made, is for that her quarentine is but for forty dayes.

1 Mar. Br.
Dower 101.

Vidua, &c. maneat, &c.] Therefore if she marry within the forty dayes, she loseth her quarentine, for then her widow-hood is past, and she hath provided for her selfe, and the quarentine is appropriate to her widowes estate.

Britton, ca. 103.

(2) *Infra quos dies assignetur ei dos.*] Here it appeareth how speedily dower ought to be assigned, to the end the widow might not be without livelihood.

Dier, 7 E. 6. fol.
76. 4 & 5 Phil.
& Mar. fol. 161.

(3) *Post obitum mariti sui.*] The day wherein the husband dieth, shall be accounted the first day, so as she shall have but thirty nine after.

Bract. li. 2. fol.
46.
Britton, ca. 103.
Fleta, lib. 5. ca.
23. 30 E. 3.
Dow. 81. 30 E.
i. vouch. 298.
8 H. 3. Dower
196. 8 H. 3.
Dower 194.
17 H. 3. ibid.
192. Rot. pat.
part 1. nu. 17.
Escheat, 4 E. 1.
m. 88.

(4) *Nisi domus illa sit castrum.*] This is intended of a castle, that is warlike, and maintained for the necessary defence of the realm, and not for a castle in name maintained for habitation of the owner, but hereof see more in the first part of the Institutes, sect. 36. & 242. *De ædibus kernelatis.* Kernellare, or cernellare, by some is derived from the French word *kerner*, or *cerner*, to fortifie, environ, or inclose round about: and by others, from *karnean* or *carnean*, a battlement of a wall; or from *karnele* or *carnele*, imbattered, or having imbattlements; and the truth is, it beareth all these significations in the lawes of England, and the use of it in castles and forts was to defend himselfe by the higher place, and to offend the assailants at the lower.

Britton ubi supra.

Brittons words be, *Si le chief mees soit chief del countee, ou del barony, ou castle, &c.* So as it appeareth by him that she is not to have her quarentine of that, which is *caput comitatus, seu baroniæ*, and with him, agreeth Fleta, but Bracton only speaketh *de castro*. The ancient law of England had great regard of honour and order.

Ubi supra.

Britton ubi supra.

(5) *Statim domus ei competens provideatur, in qua possit honestè morari.*] But this must be of a house, whereof she is dowable, for she

she must have her quarentine of that, whereof she may be endowed.

(6) *Et habeat rationabile estoverium interim de communi.*] Britton ubi supra. Britton ubi supra. *Que eux eient des issues del intier de les terres leur convenable sustenance, &c.*

Fleta saith, *Ubi inveniantur ei necessaria honestè de hæreditate communi, donec rationabilis dos fuerit ei assignata.* Fleta ubi supra.

So as *estoverium* here is taken for sustenance: there is an opinion in our books, that the widow cannot kill any of the oxen of the husbands, whiles she remain in the house; but the Register saith, *Quod interim habeant rationabilia estoveria de bonis eorundem maritorum*, which seemeth to be an exposition of this branch. 19 H. 6. 14. b. Registr. 175.

In the statute intituled, *De catallis felonum*, it is said, *Cum ibidem captus coram justiciariis nostris fuerit convictus de feloniam, tunc resid. catallorum ultra estoverium suum secundum regni consuetudinem nobis remaneant*; where *estoverium* signifieth sustenance, or aliment, or nourishment. This word *estoverium* commeth of the French verb *estover*, *id est*, *alere*, to sustain, or nourish, and this agreeth with the said old books, and in this sense it is taken in the statute of *Gloc. Trover estovers in viver et vesture*, that is, things that concern the nourishment, or maintenance of man in *victu et vestitu*, wherein is contained meat, drink, garments, and habitation. *Alimentorum appellatione venit victus, vestitus, et habitatio.* Vet. Mag. Chart. 2. pt. fol. 66. Bract. lib. 3. fo. 137.

When *estovers* are restrained to woods, it signifieth housebote, hedgebote, and ploughbote. Gloc. ca. 4. [18]

(7) *Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui, &c.*] See for this in the first part of the Institutes, sect. 37.

(8) *Nulla vidua distringatur ad se maritandam, &c.*] This is to be understood of widowes tenants in dower of lands holden of the king by knights service in chiefe, and thereupon she is called the kings widow, and if the kings widow marry without license, she shall pay a fine of the value of her dower by one year. Prer. Regis, cap. 4. Stamford prer. 17. F. N. B. 265. c. Britton, fol. 28. a. & 29. b.

And the reason of this law is yeilded wherefore they should not marry without the kings license, *Ne forte capitalibus inimicis domini regis maritentur.* Rot. pat. 4 E. 1. m. 31. Bract. ubi supra. Fleta, lib. 1. ca. 12.

And old readers have yeilded this reason, lest they should marry unto strangers, and so the treasure of the realme might be carried out, and others say that the reason is for that upon the assignement of her dower she is sworn in the chancery, *Que el ne marier sans license, et pur ceo si el fait encont. son serement el ferra fine.* 35 H. 6. 52. Fortesc.

Others say that it is a contempt to marry without the kings license, and against this statute, and therefore for this contempt she shall make a fine. 35 H. 6. 52. 15 E. 4. 13.

If the kings tenant in *capite* dye seised, his heire female of full age, if she marry without the kings license, she shall pay no fine, for she is no widow, and the words be *nulla vidua distringatur, &c.*

If the queene being the widow of a king be endowed, and marry without the kings license, because she is endowed of the seison of the king himselfe, she is out of this statute: but at the parliament holden in anno 6 H. 6. it is enacted by the king, the lords temporal, and the commons, that no man should contract with, or marry himselfe to any queen of England, without the speciall license or assent of the king, on pain to lose all his goods, and lands; Rot. Parl. anno 6 H. 6. nu. 41.

to which act the bishops, and other lords spirituall gave their consent, as farre forth, as the same swerved not from the law of God, and of the church, and so as the same imported no deadly sin.

See the first part
of the Institutes,
sect. 174.

(9) *Si de alio tenuerit.*] This is to be understood, where such a license of marriage in case of a common person was due by custome, prescription, or speciall tenure, the words being *si de alio tenuerit*; and this exposition is approved by constant and continual use and experience, *Et optimus interpres legum consuetudo.*

C A P. VIII.

N*OS. vero* (1), *vel ballivi nostri* (2), *non seisiemus terram aliquam, vel redditum* (4) *pro debito aliquo, quamdiu catalla debitoris presentia sufficiunt ad debitum reddendum* (3), *et ipse debitor paratus sit inde satisfacere. Nec plegi ipsius debitoris* (5) *distringantur, quamdiu ipse capitalis debitor sufficiat ad solutionem ipsius debiti. Et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, aut reddere noluerit cum possit* (6), *plegii* de debito respondeant, et si voluerint, habeant terras et redditus debitoris* (7), *quousque si eis satisfacti de debito, quod antea pro eo solverint, nisi capitalis debitor monstraverit, se esse quietum versus eisdem plegios.*

* [19]

W*E* or our bailiffs shall not seise any land or rent for any debt, as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefore. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt. And if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor, until they be satisfied of that which they before payed for him, except that the debtor can shew himself to be acquitted against the said sureties.

(Pl. Com. 457. in Sir Tho. Wrothes case. Pl. Com. in the Lord Berkleys case, &c. Plow. 440. Regist. 158. *Infra*, c. 18. 33 H. 8. c. 39.)

(1) *Nos vero.*] These words being spoken in the politique capacity doe extend to the successors, for in judgement of law the king in his politique capacity dieth not.

See the first part
of the Institutes;
and hereafter,
cap. 28.

(2) *Vel ballivi nostri.*] In this place the sheriffe and his under-bailiffs are intended and meant, and to this day the sheriffe useth this in his returns, *Infra ballivam meam*, for *Infra comitatum*, &c.

See Artic. super
Cart. cap. 12.
li. 3. fol. 12. b.
Sir William
Herbert's case.
5 Eliz. Dier 224.
Walter de
Chirton's case.
24 E. 3.
Pl. Com. 32.
*Debet semper
principalis executi*

(3) *Non seisiemus terram aliquam, vel redditum pro debito aliquo, quamdiu catalla debitoris presentia sufficiunt ad debitum reddendum.*] By order of the common law, the king for his debt had execution of the body, lands, and goods of the debtor: this is an act of grace, and restraineth the power that the king before had.

(4) *Redditum.*] For the severall kinde of rents, see the first part of the Institutes; Lit. lib. 2. cap. 12. whereunto you may adde, 1. *Redditus assisus*, or *redditus assise*: vulgarly rents of assise are the certain rents of the freeholders, and ancient copiholders, because they

they be assised, and certain, and doth distinguish the same from *redditus mobiles*, farm rents for life, years, or at will, which are variable and incertain. 2. *Redditus albi*, white rents, blanch farmes, or rents, vulgarly and commonly called quirents; they are called white rents, because they were paid in silver, to distinguish them from work-dayes, rent cummin, rent corn, &c. And again these are called, 3. *Redditus nigri*, black maile, that is, black rents, to distinguish them from white rents; see Rot. claus. 12 H. 3. m. 12. *Rex concessit hominibus de Andewor maneria de M. F. A, &c. Reddendo per annum ad Scaccar. Regis Lxxx. li. blanc, de Antiqua firma.* 4. *Redditus resoluti* be rents issuing out of the manors, &c. to other lords, &c. *Feodi firma*, fee farm, for this kinde of rent, vide infra Gloc. cap. 8.

After the statute of 33 H. 8. cap. 39. was made for levying of the kings debts the usuall processe to the sheriffe at this day, is, *Quod diligenter per sacramentum proborum et legalium hominum de baliva tua, &c. inquiras quæ et cujusmodi bona et catalla, et cujus precii idem (debitor) habuit in dicta baliva tua, &c. Et ea omnia capias in manus nostras, ad valentiam debiti prædicti, et inde fieri fac' debitum prædicti, &c. Et si forte bona et catalla prædicti (debitoris) ad solutionem debiti prædicti non sufficerent, tunc non omittas propter aliquam libertatem, quin eam ingrediaris, et per sacramentum præfat. proborum, et legalium hominum diligenter inquiras, quas terras et quæ tenementa, et cujus annui valoris, idem (debitor) habuit, seu seistus fuit in dicta baliva tua, &c. Et ea omnia et singula in quorumcunque manibus jam existunt, extendi fac', et in manus nostras capias, &c. Et capias prædicti debitorem, ita quod habeas corpus prædicti (debitoris) ad satisfaci' nobis de debito prædicti.'*

Whereby it appeareth, that if the goods and chattels of the kings debtor be sufficient, and so can be made to appeare to the sheriffe, whereupon he may levy the kings debt, then ought not the sheriffe to extend the lands, and tenements of the debtor, or of his heire, or of any purchaser, or terre-tenant. To conclude this point with the authority of old and auncient Ockham.

Terræ et tenementa debitoris regis, ad quascunq; manus quocunq; titulo devenerunt, post debitum regis inceptum regi tenentur, si non aliunde satisfacere possit.

(5) *Nec plegii ipsius debitoris.*] As pledges, or sureties to keepe the peace, pledges for a fine to the king upon a contempt, &c. are within this branch, but otherwise it is of mainperners, and this appeareth by Glanville, to be the common law before the making of this act.

And the author of the Mirror saith, *ceux sont pleges queux plevisher aut' chose que corps de home, car ceux ne sont propment pledges, mes sont mainperners pur ceo que ils supposent plevisshables sont liver a ceux per baille corps pur corps.*

(6) *Et si capitalis debitor defecerit in solutione, &c. aut reddere noluerit cum possit.*] Some have thought that this branch hath taken away the next precedent, concerning pledges, but both doe stand well together, for *reddere noluerit cum possit* must be understood, when the principall is able, and yet his ability cannot bee made to appeare, being in money, treasure or the like, or in debts owing to him, which he conceales, and will not *reddere*, so as *de non apparentibus, et non existentibus eadem est lex*, and in that case, *plegii de debito respondeant*, and yet the former branch concerning pledges

antequā perveniat ad fidei jussores. An act of grace, see W. 2. ca. 10. & 29. 18 E. 7. Stat. de quo warranto optime. Art. super Cart. ca. 12 & 14. Customier de Norm. cap. 60. Vide 43. El. c. 13.

See cap. 18. Glanv. li. 10. ca. 3. Britton, cap. 28. Fleta, lib. 2. ca. 62. F. N. B. 137. f. Pl. Com. 440. Pepy's case, lib. 3. fol. 13. Sir William Herbert's case, lib. 7. fol. 17, 18, 22. 50. aff. p. 3. 21 E. 4. 21.

[20]

Ockham, cap. quod vicecomes a fundis ejus, &c. Customier de Nor. cap. 60. fol. 73, &c. 76. Glanvil. lib. 10. cap. 3.

^a Britton, cap. 28.

Fleta, lib. 2. c. 56.

F. N. B. 137.

Reg. 158. 43 E.

3. 11. a. 44 E. 3.

21. 48 E. 3. 28.

32. E. 3. mrans.

des faitz, 179.

1 E. 46.

Dyer. 22. Eliz.

170.

^b Glanvil. lib.

10. cap. 4. 5.

^c Regist. 158.

Mat. Parif. 247 a.

Wendov. Walf.

40. Vide postea

Stat. de Tallagio

concedendo. 34

E. 1.

doth stand, where the pledges can make it appeare to the sheriffe, that he may levie the kings debt: see in the statute of *articuli super cartas*, cap. 11.

(7) *Et si voluerint, habeant terras, et redditus debitoris, &c.*]
^a Upon these words some have said that the writ *de plegiis acquietandis* is grounded, and seeing no mention is made in this statute of any deed, the pledges shall have that writ without any deed. And if the pledges have any deed, covenant, or other assurance for their indemnitie, then may they take their remedie at the common law; ^b but it appeareth by Glanville that this was the common law, for he saith, *Solutio vero eo quod debetur ab ipsis plegiis, recuperare inde poterint ad principalem debitorem, si postea habuerit unde eis satisfacere possit per principale placitum*, and set downe the ^c writ *de plegiis acquietandis*.

Note here is a chapter omitted, viz. *nullum scutagium, vel auxilium ponam in regno nostro nisi per commune conciliū regni nostri*, which clause was in the charter, anno 17 regis Johannis, and was omitted in the exemplification of this great charter, by Ed. 1. vide cap. 30.

C A P. IX.

CIVITAS London' habeat omnes libertates suas antiquas, et consuetudines suas. Præterea volumus, et concedimus, quod omnes aliæ civitates, burg', et villæ, et barones de quinque portibus, et omnes alii portus, habeant omnes libertates, et liberas consuetudines suas.

THE city of London shall have all the old liberties and customs, which it hath been used to have. Moreover we will and grant, that all other cities, boroughs, towns, and the barons of the five ports, and all other ports, shall have all their liberties and free customs.

(Cro. Car. 251. 45 Ed. 3. f. 26. 5 H. 7. f. 10, 19. 11 H. 7. f. 21. 5 Rep. 63. 8 Rep. 125. 3 Bulstr. 2. Mirror, 311.)

^d Mirror, ca. 5.

§ 2.

Fleta, lib. 2.

cap. 48.

Pl. Com. fol.

400.

5 H. 7. 10. 19.

8 H. 7. 4. 11 H.

7. 21.

28 Affif 24.

45 E. 3. 26.

See acts of par-

liament. Art.

super chartas

cap. 7. W. 3.

cap. 9. 7 R. 2.

nient imprimee.

9 H. 4. cap. 1.

2 H. 6. cap. 1.

&c.

See the first of

the Instit. sect.

7. 31.

8 H. 7. 4. b.

^d This chapter is excellently interpreted by an ancient author, who saith, *In pointe que demaunde, que le Citie de Londres eit ses auncient franchises, et ses frank customes, est interpretable in cest maner, que les citizens eient leur fraunchises, dont ils sont inherit per loyall title, de dones, et confirmements des royes, et les queux ilz ne ont forseits per nul abusio, et que ilz eient leur franchises, et customes, que sont suserable per droit, et nient repugnant al ley: Et le interpretation que est dit de Londres soit entendu de les cinque ports, et des autres lieux; and this interpretation agreeth with divers of our later books.*

It is a maxime in law, that a man cannot claim any thing by custome or prescription * against a statute, unless the custome, or prescription be saved by another statute; for example: they of London claim by custome, to give lands without license to mortmain because this custome is saved, and preserved, not onely by this chapter of *Magna Charta*, but by divers other statutes, et sic de cæteris. See more in particular concerning London, in the fourth part of the Institutes, cap. Of the Courts of the City of London.

C A P.

* [21]

CAP. X.

NULLUS distringatur ad faciendum majus servitium de feodo militis, nec de alio libero tenemento, quam inde debetur.

NO man shall be distrained to do more service for a knights fee, nor any freehold, than therefore is due.

(Custumier de Nôrm. cap. 114. fol. 132. b. 1 Roll, 164. 2 Roll, 182. 10 Rep. 108. Fitz. Avowry, 96, 157, 200. Plow. 243. 14 H. 7. f. 14. Fitz. Brief, 661, 881, 882. Fitz. Prærog. 28. V. N. B. f. 15.)

That this was the auncient law of England, appeareth by Glanvill, and also that the writ of *Ne injuste vexes*, was not grounded upon this act, appeareth also by him, for he saith, *Et alia quædam placita, veluti, si quis conqueratur se curiæ de domino suo, quod consuetudines, et indebita servitia, vel plus servitii exigit ab eo, quā inde facere debeat*: and setteth down the form of the writ of *Ne injuste vexes*; *Rex N. salutem. Prohibeo tibi, ne injuste vexes, vel vexari permittas H. de libero tenemento suo, quod tenet de te in tali villa, nec inde ab eo exigas, aut exigi permittas consuetudines vel servitia, quæ tibi inde facere non debet, &c.*

And another ancient author which wrote of the ancient laws long before this statute, maketh mention of the writ of *Ne injuste vexes*.

Hereby it appeareth how they are deceived, that hold that this writ is grounded upon this act, and how necessary the reading of ancient authors is, to give the ancient common law his right, as hereby it appeareth.

The words of the statute be, *nullus distringatur*, therefore if the lord incroach more rent of the same nature, by the voluntary payment of the tenant, he shall not avoid this incroachment in an avowry, but in an assise *cessavit*, or *ne injuste vexes*, the tenant shall avoyd the incroachment; this rule holdeth not in case of a succesor, or of the issue in taile, for they shall avoyd it in an avowry, but if the service incroached be of another nature, the tenant shall avoyd that season in an avowry, for *majus servitium* implieth a greater exaction of the same nature: if the incroachment of the same nature be gotten by cohertion of distress, there the tenant shall avoyd that season in an avowry, for *nullus distringatur ad faciendum majus servitium*. But if an incroachment be made upon a tenant in tail, or tenant for life, or any other, who cannot maintain a writ of *ne injuste vexes*, nor a *contra formam collationis*, nor other remedy, he shall have an action upon this statute; for this statute intendeth to relieve those, which had no remedy by the common law,

Glanv. li. 12. ca. 9. 10. Reg. fol. 4. & 59. b. Bracton, fo. 329. Fleta, li. 5. cap. 38. lib. 2. c. 60. Brit. c. 27. fo. 60. b.

Mirror, cap. 2. § 19. & cap. 5. § 1.

F. N. B. 10. e. Pl. Com. 243. b.

Pl. Com. 94. 243. 10 H. 7. 11. b. 30 H. 6. 5. b. 22. ass. 68. 28. ass. 33. 12 E. 4. 7. b. 8 E. 4. 28. b. 4 E. 2. Avow. 202. 18 E. 2. ibidem. 217. 20 E. 3. ibid. 131. 5 E. 4. 2. 16 E. 4. 11. 20 E. 4. 11. 12 H. 423. F. N. B. 10. h. See the first part of the Inst. sect.

C A P. XI.

COMMUNIA placita (1) non sequantur (2) curiam nostram (3), sed teneantur in aliquo certo loco. COMMON Pleas shall not follow our court, but shall be holden in some place certain.

(Mirror, cap. 5. § 2. 1 Inst. 71. 2. Plow. 244. 12 Rep. 59. Regist. 187. 28 Ed. 1. c. 4. 4 Inst. 99. 11 Rep. 75.)

[22]

Mirror, ca. 1.
§ 4.
Stamf. Pl. cor.
fo. 1.
Vide cap. 17.

Before this statute, common pleas might have been holden in the kings bench, and all originall writs retournable into the same bench: and because the court was holden *coram rege*, and followed the kings court, and removable at the kings will, the returns were *ubicunque fuerimus*, &c. whereupon many discontinuances ensued, and great trouble of jurors, charges of parties, and delay of justice, for these causes this statute was made.

(1) *Communia placita*.] Here it is to be understood, a division of pleas, for *placita* are divided in *placita coronæ*, and *communia placita*: *Placita coronæ* are otherwise, and aptly called *criminalia*, or *mortalia*, and *placita communia* are aptly called *civilia*: *Placita coronæ* are divided into high treason, misprision of treason, petit treason, felony, &c. and to their accessories, so called, because they are *contra coronam et dignitatem*; and of these the court of common pleas cannot hold plea; of these you may reade at large in the third part of the Institutes. Common or civil pleas are divided into reall, personall, and mixt.

Vide cap. 17.

They are not called *placita coronæ*, as some have said, because the king *jure coronæ* shall have the suite, and common pleas, because they be held by common persons. For a plea of the crown may be holden between common persons, as an appeale of murder, robbery, rape, felony, mayhem, &c. and the king may be party to a common plea, as to a *quare impedit*, and the like.

Now as out of the old fields must come the new corne, so our old books do excellently expound, and expresse this matter, as the law is holden at this day, therefore Glanvill saith, *Placitorum aliud est criminale, aliud civile*; where *placitum criminale*, is *placitum coronæ*; and *placitum civile*, *placitum commune*, named in this statute.

Bracton, lib. 3.
fol. 101. b.
Fleta, li. 2. cap.
58.

And Bracton that lived when this statute was made, saith, *Sciendum quod omnium actionum sive placitorum (ut inde utatur æquivoce) hæc est prima divisio, quod quædam sunt in rem, quædam in personam, et quædam mixtæ; item earum quæ sunt in personam alia criminalia et alia, civilia, secundum quod descendunt ex maleficiis vel contractibus; item criminalium, alia major, alia minor, alia maxima, secundum criminum quantitatem.*

Fleta, li. 1. cap.
15.

Fleta saith, *Personaliū injuriarum quædam sunt criminales, et quædam civiles; criminalium quædam sententialiter mortem inducunt, quædam vero minime.*

Britton

Britton calleth them pleas *de la corone*, and common pleas, and the court taketh his name of the common pleas. Britton, fol. 3. &c.

To treat of the jurisdiction of this court, doth belong to another part of the Institutes, but a word or two of the antiquity of the court of common pleas, which is the lock and the key of the common law.

Glanvill saith, *placita in superioribus*, &c. *sicut et alia quælibet placita civilia*, &c. *solet autem id fieri corā justiciariis domini regis in banco residentibus*, &c. And in another place, *coram justic' in banco sedentibus*. Glanv. lib. 11. c. 1. & lib. 2. cap. 6.

Bracton in divers places calls the justices of the court of common pleas, as Glanvill did, *justiciarii in banco residentes*, so called for that the returns in the kings bench, are *coram rege ubicunque fuerimus in Anglia*, as hath been said, because in ancient time it was, as hath been said, removable, and followed the kings court. Bract. li. 3. fol. 105. b. & 103. b.

And therefore all writs retournable, *coram justiciariis nostris apud Westm.* are retournable before the judges of the common pleas, and all writs retournable, *coram nobis ubicunque tunc fuerimus in Anglia*, are retournable into the kings bench. Artic. super Cart. cap. 5. Fleta, lib. 2. cap. 2. F. N. B. 69. m. Britton.

Britton speaking of the court of common pleas, saith, *Ouster cco voilloms que justices demurgent continualment a Westm. ou ailours, ou nous voudrions ordinaire a pleader common pleas*, &c.

Fleta saith, *Habet et (rex) curiam suam et justiciarios suos residentes qui recordum habent in hiis quæ coram eis fuer' placitata, et qui potestatem habent de omnibus placitis, et actionibus realibus, personallibus, et mixtis*, &c. Fleta, li. c. 28. & 54.

It is manifest that this court began not after the making of this act, as some have thought, for in the next chapter, and divers others of this very great charter mention is made *de justiciariis nostris de banco*, which all men know to be the justices of the court of common pleas, commonly called the common bench, or the bench, and Doct. and Stud. saith, that it is a court created by custome. & cap. 13. 7 E. 4. 53. D. & St. 12. b.

[23]

The abbot of B. claimed consfans of plea in writs of assise, &c. in the times of king Etheldred, and Edward the Confessor, and before that time, time out of minde, and pleaded a charter of confirmation of king H. 1. to his predecessor, and a graunt, &c. so that the justices of the one bench, or of the other should not intermeddle. 26 Ass. p. 24.

It appeareth by our books that the court of common pleas was in the reign of H. 1. 4 E. 3. 49 39 E. 3. 21.

That there was a court of common pleas in anno 1 H. 3. which was before this act; *Martinus de Pateshull* was by letters patents constituted chiefe justice of the court of common pleas in the first yeare of H. 3. Rot. pat. 1 H. 3.

It is resolved by all the judges in the exchequer chamber, that all the courts viz. the kings bench, the common place, the exchequer, and the chancery, are the kings courts, and have been time out of memory, *Issint que home ne poet scaver que est plus auncient*. 9 E. 4. 53.

(2) *Non sequantur curiam nostram.*] Divers speciall cases are out of this statute. 21 H. 3. brief. 883.

1. The king may sue any action for any common plea in the kings bench, for this generall act doth not extend to the king. Tr. 26 E. 1. coram rege Northampton. Tr. 18 E. 1. coram rege Rot. 62. 31 E. 3. prer. 23. 17 E. 3. 50. • 31 H. 6. fo. action

10, 11.
Artic. super
cart. cap. 4.
Pl. Com. 208. b.
38 aff. p. 20.
simil.

action by bill in the kings bench, because he that is in *custodia marescalli* ought to have the priviledge of that court, and this act taketh not away the priviledge of any court, because if he should be sued in any other court, he should not in respect of his priviledge answer there, and so it is of any officers, or ministers of that court: the like law is of the court of chancery, and eschequer.

3. Any action that is *Quare vi et armis*, where the king is to have a fine, may be purchased out of the chancery, retournable into the kings bench, as *ejectione firmæ trus. vi et armis*, forcible entry and the like.

9 H. 7. 10.
19 E. 3. affise 84.
1 H. 7. 12. Reg.
F. N. B. 177.
14 H. 7. 14.
16 E. 3. bre. 661.

4. And a replevin may be removed into the kings bench, because the king is to have a fine, and so it is in an affise brought in the county where the kings bench is.

5. Albeit originally the kings bench be restrained by this act to hold plea of any real action, &c. yet by a mean they may. As if a writ in a real action be by judgment abated in the court of common pleas, if this judgment in a writ of error be reversed in the kings bench, and the writ adjudged good, they shall proceed upon that writ in the kings bench, as the judges of the court of common pleas should have done, which they doe in the default of others, for necessity, lest any party that hath right should be without remedy, or that there should be a failer of justice, and therefore statutes are alwayes so to be expounded, that there should be no failer of justice, but rather then that should fall out, that case (by construction) should be excepted out of the statute, whether the statute be in the negative, or affirmative.

Stat. de Mirton,
cap. 10.

6. In a *redisseisin*, or the like.

(3) *Curia nostra*.] Are words collective, and not onely extend to the kings bench, but into the court of eschequer, vide artic. super Cart. cap. 4.

F. N. B. 190.
224. 246.

When judgment is given before the sheriffe, and the tenant hath no goods, &c. in that county, he may have a *certiorare* to remove the record into the kings bench, and there have execution, for that is not *placitum*. See more hereof in the fourth part of the Institutes, cap. Of the Court of Eschequer.

[24]

C A P. XII.

RECOGNITIONES de nova disseisina, et de morte antecessoris (2), non capiantur nisi in suis comitat' (1), et hoc modo; Nos vero si extra regnum fuerimus, capital' justic' nostri (3) mittent justiciar' nostros per unumquemque comitatum, semel in ann', qui cum militibus eorund' in com', capiant in com' illis assis. prædict'. Et ea quæ in adventu suo in illo comitat' per justic' nostr' prædict' ad dictas assisas capiend' missos, terminari non possunt, per eisdem terminent' alibi in itinere suo (4). Et ea quæ

ASSISES of novel disseisin, and of mortdancester, shall not be taken but in the shires, and after this manner: if we be out of this realm, our chief justicers shall send our justicers through every county once in the year, which, with the knights of the shires, shall take the said assises in those counties; and those things that at the coming of our foresaid justicers, being sent to take those assises in the counties, cannot be determined, shall be ended by them in some other place in their circuit; and those things, which

quæ per eosdem, propter difficultatem aliquorum articulorum terminari non possunt, referant' ad justiciari' nostros de banco, et ibi terminentur.

which for difficulty of some articles cannot be determined by them, shall be referred to our justicers of the bench, and there shall be ended.

(12 Rep. 31, 52. 13 Rep. 8. Fitz. Affize, 21. 8 Rep. 57. Fitz. Mortdanc. 2, 21, 53. 24 Ed. 3. f. 23. 1 Anderson, 230. 2 H. 4. f. 1, 20. Regist. 197. 13 Ed. 1. stat. 1. c. 30.)

Before the making of this statute, the writs of assise of *novel disseisin*, and *mordanc'* were retournable, either *coram rege*, or into the court of common pleas, and to be taken there, and this appeareth by Glanvill, *Coram me, vel coram justiciariis meis*. But since this statute, these writs are retournable, *Coram justiciariis nostris ad assisas, cum in partes illas venerint*; by force of these words, *Mittent justiciarios nostros per unumquemque comitat' nostrum semel in anno, qui cum militibus eorundem comitatum capiant in comitat' illis assisas prædictas*.

Glanv. li. 13.
ca. 3. & 33.
F. N. B. 177. f.
Regiltrum.

(1) *Nisi in suis comitatibus*.] This tended greatly to the ease of the jurors, and for saving of charges of the parties, and of time, so as they might follow their vocations, and proper business, and the rather, for that the assise of *novel disseisin* was frequens et festinum remedium in those dayes, and so was the assise of *mordanc'* also. It is a great benefit to the subject to have justice administered unto him at home in his owne country.

Mirror, ca. 5.
§ 2.
See W. 2. ca. 30.

For an assise of *novel disseisin*, and assise of *mordanc'*, see the first part of the Institutes.

And where Bracton saith, *Succurritur ei (1. disseisito) per recognitionem assise novæ disseisinæ multis vigiliis excogitatam, et inventam recuperandæ possessionis gratia, quam disseisitus injuste amisit, et sine judicio, ut per summariam cognitionem absq; magna juris solemnitate quasi per compendium, negotium terminetur*. See the *Custumier de Normand'*, (composed, as hath been said, in 14 H. 3.) sect. 91. & 93. of the assise of *novel disseisin*, which being invented and framed in England, as Bracton and others have testified, must of necessity be transported into Normandy.

See the first part
of the Institutes,
sect. 234.
Bract. l. 4. fo.
164.

But where we yeeld to Bracton, that the assise of *novel disseisin* was so invented, so he must yeeld to us, that it was a very auncient invention, for Glanvill maketh mention thereof, and of the assise of *mordanc'*, as hath been said, and by the Mirror also the antiquity of assise of *novel disseisin* doth appeare, who saith, that this writ of assise of *novel disseisin*, was ordained in the time of Ranulph de Glanvil.

See the preface
of the 2d part of
the Institutes.

Glanv. lib. 13.
ca. 3. & 33.
Custumier de
Norm. ubi supra.
Mir. ca. 2. § 15.
26 Aff. p. 24.

But the case of 26. assise before touched, doth prove that the writs of assise are of farre greater antiquity, for there it appeareth that in an assise of *novel disseisin*, claimed to have consans of plea, and writs of assise, and other originall writs out of the kings courts by prescription time out of minde of man, in the times of S. Edmond, and S. Edward the Confessor, kings of this realme before the conquest, and shewed divers allowances thereof; but true it is, as the ancient authors affirme, that a new forme of writs of assise, for the more speedy recovery of possession, which were called *festina remedia*, was invented in England since the conquest, and were called *brevia de assisa novæ disseisinæ*; which writs so altered continue so until this day, and according to the alteration is cited in the *Custumier*, cap. 93. fol. 107. b.

[25]

If

24 E. 3. 23.
2 E. 3. 23. 1.
1 E. 4. 1.

If an assise be taken in *proprio comitatu*, and the tenant pleade, and after the assise is discontinued by the *non venu* of the justices, this act extends to the assise, but not to a reattachment thereupon, for that the assise was first arraigned and examined in the proper county, neither doth this act extend to a writ of attaint, brought upon the verdict of the recognitors of the assise: and herewith agreeth Britton, who saith, *Et tout contene la grand Chre. des franchises, que ascuns assises soient prises in counties, pur ceo ne intent nul que certifications, et attaints auter foitz estre pledes, &c.*

6 E. 3. 55, 56.
Britton, cap. 97.
fol. 240.
F. N. B. 181.

Bracon, lib. 4.
fol. 291.

And Bracon saith, *Et si ad hoc se habeat communis libertas, quod assise extra comitatum capi non debeant, non sequitur quod propter hoc remaneant jurata in com' capiendæ; aliud enim habet privilegium assisa, et aliud jurata.*

6 E. 3. 55, 56.
19 E. 3. ass. 84.

An assise is brought in the kings bench, then being in the county of Suff. (as it may be, as hath been said) of lands lying in that county, the tenant plead in barre, the pl' reply and pray the assise, the kings bench is removed to Westm. and there the pl' prayed the assise, this statute is, that the assise shall not be taken but in the county, and now the kings bench is in another county, and the originall cannot goe out of this place, for when a record is once in this court, here it must remaine, wherefore by th'advise of all the judges, the assise was awarded at large, *quia nihil dicit*, and a *nisi prius* granted in the county of Suff. that there might the assise be taken. A case worthy of observation, how by this exposition both the parties sute was preserved, and the purvien of this statute observed.

18 E. 2. assise
382.
13 E. 3. Jurisd.
23. Rot. Par-
liam. de anno
18 E. 1. inter
petitiones.
28 E. 3. cap. 2.

Yet in some case notwithstanding this negative statute, the assise should not have been taken in his proper county. And therefore if a man be disseised of a commote or lordship marcher in Wales, holden of the king in *capite*, as for example of *Gowre*, the writ of assise should have been directed to the sherife of Gloc. within the realme of England, and albeit the land of *Gowre* was out of the power of the sherife of Gloc. being out of his county within the dominion of Wales, and this statute saith that the assise shall not be taken but in his proper county, yet was the assise taken in the county of Gloc. and judgment thereupon given and affirmed in a writ of error: and the reason is notable, for the lord marcher though he had *jura regalia*, yet could not he doe justice in his owne case, and if he should not have remedy in this case by the kings writ out of the chauncery in England, he should have right and no remedy by law given for the wrong done unto him, which the law will not suffer, and therefore this case of necessity is by construction excepted out of the statute. And it was well said in an old booke, *Quamvis prohibetur quod communia placita non sequantur curiam nostram, non sequitur propter hoc, quin aliqua placita singularia sequantur dominum regem*, and the like in this negative statute.

20 H. 3. tit. brev.
881.

Hereby it appeareth (that I may observe it once for all) that the best expositors of this and all other statutes are our bookes and use or experience.

More shall be said hereof in the exposition of the statute of W. 2.

(2) *De morte antecessoris.*] See the first part of the Institutes, sect. 234. *Custumier de Norm.* cap. 98. fol. 115.

(3) *Nos vero si extra regnum fuerimus, capitales justitiiarii nostri.*] This *capitalis justitiarius* (when the king is *extra regnum*, out of the

the realme) is well described by Ockham, *Rege extra regnum agente, bria, dirigebantur sub nomine presidentis justitiarum et testimonio ejusdem*. This is he that is * constituted by letters patents when the king is out of the kingdome, to be *custos sive gardianus regni*, keeper of the kingdome, and *locum tenens regis*, and for his time is *prorex*, such as was Edward duke of Cornewall 13 E. 3. Lionell duke of Clarence 21 E. 3. And the *teste* to all originall writs, were *teste Lionello filio nostro charissimo custode Angliæ, &c.* John duke of Bedford 5 H. 5. Richard duke of Warwick 3 E. 4. and many others: before whom as keepers of the kingdome, parliaments have been holden, and as hath been said, the *teste* of originall writs are under the name of the keeper, which no officer can doe when the king is within the realme. In 8 H. 5. a great question arose whether if the kings lieutenant, or keeper of his kingdome under his *teste*, doth summon a parliament, the king being beyond sea, and in the meane time the king returne into England, whether the parliament so summoned might proceed: it was doubted that in *presentia majoris cessaret potestas minoris*, and therefore it was enacted that the parliament should proceed, and not be dissolved by the kings returne. Now that this statute is to be intended of such a lieutenant or keeper of the kingdome, it is proved by this act itselfe, *capitales justitiarum nostri mittent justitios nostros*, that is, they shall name and send justices by authority under the great seale under their owne *teste*, which none can doe but the king himselfe if he be present, or his lieutenant, or the keeper or guardian of his kingdome, if he be, as this act speaketh, *extra regnum*: and this exposition is made *ex verbis et visceribus actus*. But then it is demanded, whether this *locum tenens regis, seu custos regni*, was called *capitalis justitiarius* before the making of this act, and this very name you shall read in Glanville, who saith *Præterea sciendum, quod secundum consuetudines regni, nemo tenetur respondere in curia domini sui de aliquo libero tenemento suo sine præcepto domini regis vel ejus capitalis justitiarum*, where *capitalis justitiarius* is taken for *custos regni*.

It is to be observed, that before the raigne of king Ed. 1. the kings chiefe justice was sometime called *summus justitiarius*, sometimes, *presidens justitiarius*, and sometimes *capitalis justitiarius*. In anno primo E. 1. his chiefe justice was called *capitalis justitiarius ad placita coram rege tenenda*; and so ever since; and this chiefe justice is created by writ, and all the rest of the justices of either bench, by letters patents.

In Glanvilles time, and before, the kings justices were called *justiciæ*, the returnes of writs being *coram justitiis meis*, so as the kings justices were antiently called *justitiæ*, for that they ought not to be only *justi* in the concrete, but *ipsa justitia* in the abstract. Since that time, as by this great charter in many places it appeareth, they are called *justitiarum a justitia*. The honourable manner of the creation of these justices you may read in Fortescue.

(4) *Alibi in itinere suo.*] This is taken largely and beneficially, for they may not only make adjournment before the same justices in their circuite, but also to Westm. or to Serjeants Inne, or any other place out of their circuite, by the equity of this statute, and according as it had been alwaies used: for constant allowance in many cases doth make law.

* The statute speaking only of an adjournment in assise of *novell disseisin*, &c. and yet a certificate of an assise is within this statute.

Rot. Parliament
13 E. 3. nu. 11.
5 H. 5. nu. 1.
3 E. 4. nu. 14.
21 E. 3. fol. 37.

8 H. 5. cap. 25

Glanvil, lib. 12.
cap. 25.
Rot. Pat. an. 1
E. 1.
Hereof you may
read more in the
4th part of the
Institut. cap. of
the Court of
King's Bench.
Glanvil, lib. 2.
c. 6.
Hovend. fol.
413.
Fortescue, cap.
51.

12 H. 4. 20.
29 Ass. 1.
27 Ass. 5. 60.
4 E. 3. 41.

12 H. 4. 9.

Sed

^b Regula.

^b Sed rerum progressus ostendunt multa, quæ initio prævideri non possunt.

^c 48. E. 3. 7. 47.
aff. 1. 39. E. 3. 6.
32 aff. 9. 21 E.
3. 3.
42 E. 3. 11.
* 7 H. 6. 9.
3 E. 3. 16. 8 aff.
15. 15 E. 3.
aff. 96. 17 E. 3.
28. 14 E. 3.
aff. 110. 20 E. 3.
aff. 123.

^c Time found out, that because the justices of assise came not but once in the yeare, and that any adjournement could not have beene made by this act, unles the jurors had given a verdict, for this act saith *propter difficultatem aliquorum articulorum*, and not upon demurrer, doubtfull plea, *Esoppel*, &c. * or for preservation of the kings peace, and no provision was made by this act, if the ten. in the assise of *merdaunc*. had made a foreine vower, or pleaded a foreine plea: all these are holpen by the statute of W. 2. cap. 30. as shall appeare when we come thereunto.

22 E. 3. 5. 29 aff. 7. 34 aff. 3. 43 aff. 1. 3 H. 4. 18. 22 H. 6. 19.

[27]

C A P. XIII.

ASSISÆ de ultima præsentatione semper capiantur coram iustitiariis de banco, et ibi terminentur.

ASSISES of darrein presentment shall be alway taken before our justices of the bench, and there shall be determined.

(Regist. 30. 13 Ed. 1. stat. 1. c. 30.)

Glanvil, lib. 13.
cap. 16. 18, 19.
Bracton, lib. 4.
fol. 238, &c.
Britton, cap. 90.
fol. 222.
Fleta, lib. 5. c. 11.
Regist. fol. 30.
F. N. B. fol. 30.
W. 2. cap. 30. 5 Mar. Dier. 135. 9 Eliz. Dier. 260.

It appeareth by Glanvil, that before this statute the writ of darrein presentment was retornable *coram me vel justic. meis*. And the reason of this act was for expedition, for doubt of the laps.

By the statute of W. 2. it is provided, that justices of *nisi prius* may give judgement in an assise of darrein presentment, and *quare impedit*.

C A P. XIV.

LIBER homo (1) non amercietur (2) pro parvo delicto, nisi secundum modum illius delicti, et pro magno delicto secundum magnitudinem delicti, salvo sibi contenmento suo (3): et mercator eodem modo, salva merchandisa sua (4), et villanus alterius quam noster, eodem modo amercietur: (5) salvo wainagio suo (6), si inciderit in misericordiam nostram. Et nulla prædictarum misericordiarum ponatur, nisi per sacramentum proborum et legalium hominum de vicineto. Comites et barones non amercientur, nisi (7) per

A Free man shall not be amerced for a finall fault, but after the manner of the fault; and for a great fault after the greatnes thereof, saving to him his contenment; and a merchant likewise, saving to him his merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciements shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and barons shall not be amerced but by their peers, and after the

pares (8) *suos, et non nisi secundum modum delicti. Nulla ecclesiastica persona* (9) *amercietur secundum quantitatem beneficii* (10) *sui ecclesiastici, sed secundum laicum tenementum suum, et secundum quantitatem delicti.*

the manner of their offence. No man of the church shall be amerced after the quantity of his spiritual benefice, but after his lay-tenement, and after the quantity of his offence.

(Mirror, 312. 3 Ed. 1. c. 6. Regist. 184, 187. 1 Roll, 74, 446. Br. Amercement, 2, 25, 32, 33, 53, 65. 10 H. 6. fo. 7. 7 H. 6. fo. 13. 19 Ed. 4. fo. 9. 2 Bulstr. 140. 3 Bulstr. 279. 21 Ed. 4. fo. 77. 8 Co. 38, 59.)

(1) *Liber homo.*] A free man hath here a speciall understanding, and is taken for him, *qui tenet libere*, for a free-holder, as it is taken in the *venire fac.* where *duodecim liberos, &c. homines*, are taken for free-holders, and this appeareth by this act, which saith, *salvo contentenemento suo*, whereof more shall be said in this chapter. The words of this act being *liber homo*, it extendeth as well to sole corporations, as bishops, &c. as to lay men, but not to corporations aggregate of many, as major and commonalty, and the like, for they cannot be comprehended under these words *liber homo*, &c.

Vide W. 1. cap. 6.

(2) *Amercietur.*] This act extends to amerciements, and not to fines imposed by any court of justice: what amerciements be, and whereof this word amerciament cometh, see the 8. book of my reports, see also there, that this statute is in some cases of amerciaments, to be intended of private men, and not of amerciaments of officers, or ministers of justice, so as *liber homo* is not intended of officers, or ministers of justice. And how, and in what cases the afferment shall be, you shall also read there, together also with the ancient authors, and many other authorities of law, concerning these matters.

W. 1. cap. 18.
11 H. 4, 5.
Lib. 8. fol. 39, 40.
Greyllie's case.
Glanvil, lib. 9. cap. 11.
Fleta, lib. 2. c. 60.
10 E. 2. action sur le statut. 84.
Regist. 86. 184-187.

[28]

It appeareth by *Glanvile* that this act was made in affirmance of the common law, as hereafter shall appeare, but yet the writ *de moderata misericordia*, is grounded upon this statute, for it reciteth the statute and giveth remedy to the partie that is excessively amerced.

(3) *Salvo contentenemento suo.*] First for the word, you shall read it in *Glanvile*, *Est autem misericordia domini regis, qua quis per juramentum legalium hominum de viceneto catenus amerciandus est, ut quid de suo honorabili contentenemento amittet.*

Glanvil. ubi sup.

And *Bracton*, *Salvo contentenemento suo.*

Bracton, lib. 3. fol. 116.

Fleta, *continentia.*

Fleta, lib. 1. c. 43. W. 1. cap. 6.

2. For the signification, contentenement signifieth his countenance, which he hath, together with, and by reason of his free-hold, and therefore is called contentenement, or continence, and in this sense doth the statute of 1 E. 3. and old Nat. Brev. use it, where countenance is used for contentment: the armor of a souldior is his countenance, the books of a scholler his countenance and the like.

1 E. 3. cap. 4. Stat. 2. Vet. N.B. fol. 11.

(4) *Et mercator eodem modo salva merchandisa sua.*] For trade and traffique is the livelihood of a merchant, and the life of the commonwealth, wherein the king and every subject hath interest, for the merchant is the good bayliffe of the realme to export and vent the native commodities of the realme, and to import and

11. INST.

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bring

bring in the necessary commodities for the defence and benefit of the realme.

See the first part
of the Institutes,
sect. 172. 189.

(5) *Et villanus alterius quam noster eodem modo amercietur salvo wainagio suo.*] Here *villanus* is taken for one that is a bondman, *nativus de sanguine or servus*.

A villein is free to sue, and to be sued, by and against all men, saving his lord.

See the first part
of the Institutes,
sect. 172.

(6) *Salvo wainagio suo.*] Wainagium, is the contenement or countenance of the villein, and cometh of the Saxon word *wagna*, which signifyeth a cart or waine, wherewith he was to doe villein service, as to carry the dung of the lord out of the scite of the mannor unto the lords land, and casting it upon the same, and the like, and it was great reason to save his wainage, for otherwise the miserable creature was to carry it on his back; it is said here *salvo wainagio suo*, but yet the lord may take it at his pleasure.

But hereby it appeareth, that albeit the law of England is a law of mercy, yet is it a law, which is now turned into a shadow, for where by the wisdom of the law, these amerciements were instituted to deterre both demaundants and plaintiffs from unjust suits, and tenants, and defendants from unjust defences, which was the cause in ancient times of fewer suits, but now we have but a shadow of it. *Habemus quidem senatus-consultum, sed in tabulis reconditum, et tanquam gladium in vagina repositum.*

Cicero.

Mirror, cap. 1.
sect. 3.
38 E. 3. 31.
4 H. 6. 7. 9 H. 6. 2.
19 E. 4. 9.
21 E. 4. 77. b.
Mirror, cap. 4.
de amerciam.
3 E. 3. Coron.
370.
Stanf. pl. cor.
fol. 35. b.
Mirror, ubi sup.
Britton, fol. 17.
b. & 34. b.

(7) *Comites et barones non amercientur nisi per pares, &c.*] Although this statute be in the negative, yet long usage hath prevailed against it, for the amerciamment of the nobility is reduced to a certainty, viz. a duke 10l. an earle 5l. a bishop, who hath a baronie 5l. &c. in the Mirror it is said that the amerciamment of an earle was an Cl. and of a baron an C. marks.

It is said that a bishop shall be amercied for an escape 100l. A gayler shall be amercied for a negligent escape of a felon attaint 100l. and of a felon indited only 5l.

If a noble man and a common person joyne in an action, and become nonsute, they shall be severally amercied: viz. the noble man at C s. and the common person according to the statute, therefore when a noble man is plaintife, it is policy rather to discontinue the action, then to be non-suite.

(8) *Per Pares.*] By his peeres, that is, by his equals.

The generall division of persons by the law of England, is either one that is noble, and in respect of his nobility of the lords house of parliament, or one of the commons of the realme, and in respect thereof, of the house of commons in parliament: and as there be diverse degrees of nobility, as dukes, marqueses, earles, viscounts, and barons, and yet all of them are comprehended within this word, *pares*, so of the commons of the realme, there be knights, esquires, gentlemen, citizens, yeomen, and burgessees of severall degrees, and yet all of them of the commons of the realme, and as every of the nobles is one a peer to another, though he be of a severall degree, so is it of the commons; and as it hath been said of men, so doth it hold of noble women, either by birth, or by marriage, but see hereof cap. 29.

Bracton saith, *Comites vero vel barones, non sunt amerciandi, nisi per pares suos, et secundum modum delicti, et hoc per barones de seacario, vel coram ipso rege. Nulla ecclesiastica persona amercietur secundum*

Bracton, lib. 3.
fol. 116. b.
Brit. fol. 2. b.
Fleta, lib. 1.

[29]

Britton, cap. 2.
fol. 36.

secundum quantitatem beneficii sui ecclesiastici, sed secundum laicum tenent. suum.

(9) *Ecclesiastica persona.*] For ecclesiasticall persons, and their diversities, and degrees, see the first part of the Institutes, *ubi sup.*

(10) *Beneficium.*] Benefice. *Beneficium* is a large word, and is taken for any ecclesiasticall promotion or spirituall living whatsoever.

Here appeareth a priviledge of the church, that if an ecclesiasticall person be amerced (though americiaments belong to the king) yet he shall not be amerced in respect of his ecclesiasticall promotion, or benefice, but in respect of his lay fee, and according to the quantity of his fault, which is to be afferred: and Bracton setteth downe the oath of the afferers of americiaments, *et ad hoc fideliter faciend. affidabunt americiatores, quod neminem gravabunt per odium, nec alicui deferent propter amorem, et quod celabunt ea quæ audierunt.*

cap. 43. & lib. 2. c. 60.

Vide lib. nigr. Scaccarii parte 1. cap. 4.

Of ancient time the barons of the exchequer were barons and peers of the realme. See the first part of the Institutes, sect. 133.

Bracton, lib. 3. fol. 116.

Fleta, lib. 1. c. 43.

C A P. XV.

NULLA villa, nec liber homo distringatur facere pontes, aut riparias (1), nisi qui ab antiquo, et de jure facere consueverunt tempore Henrici regis avi nostri.

NO town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have been accustomed to make them in the time of king Henry our grandfather.

Here it is to be observed, that in the raigne of king John, and of his elder brother king Richard, which were troublesome and irregular times, divers oppressions, exactions, and injuries, were inroached upon the subject in these kings names, for making of bulwarks, fortresses, bridges, and bankes, contrary to law and right.

But the raigne of king H. 2. is commended for three things, first, that his privy counsell were wise, and expert in the lawes of the realme. Secondly, that he was a great defender and maintainer of the rights of his crowne, and of the lawes of his realme. Thirdly, that he had learned and upright judges, who executed justice according to his lawes. Therefore for his great and never dying honour, this and many other acts made in the raigne of H. 3. doe referre to his raigne, that matters should be put in ure, as they were of right accustomed in his time, so as this chapter is a declaration of the common law, and so in the raignes of H. 4. and H. 5. the parliaments referre to the raigne of king E. 1. who was a prince of great fortitude, wisdom and justice.

And divers statutes referre to king Edw. 3. who was a noble, wise, and warlike king, in whose raigne, the lawes did principally flourish.

Riparia.] Is here taken for *ripa*, which is *extrema et eminentior terræ ora, quam fluvius utrinque alluit.*

But the making of bulwarks, fortresses, and other things of like kinde, were not prohibited by this act, because they could not be erected, but either by the king himself, or by act of parliament.

See cap. 35. 37.

See Chart. de Foresta, cap. 1 & 3.

Rot. Parl. nu.

82. 13 R. 2. c. 5.

4 H. 4. cap. 2.

3 H. 5. cap. 18.

27 H. 6. cap. 2.

[30]

4 H. 8. cap. 1.

2 & 3 Phil. &

Mar. 3. Phil. 1.

C A P. XVI.

NULLÆ ripariæ defendantur de cætero, nisi illæ quæ fuerunt in defenso tempore Henrici regis avi nostri, et per eadem loca, et eosdem terminos, sicut esse consueverunt tempore suo.

NO banks shall be defended from henceforth, but such as were in defence in the time of king Henry our grandfather, by the same places, and the same bounds, as they were wont to be in his time.

That is, that no owner of the banks of rivers shall so appropriate, or keep the rivers severall to him, to defend or barre others, either to have passage, or fish there, otherwise, then they were used in the raigne of king H. 2.

Mirror, ca. 5.
§ 2.

This statute, saith the Mirror, is out of use, *Car plusors rivières sont ore appropriées et engarnies, et mise en defence, que soilount estre communes a pisser et user en temps le roy Henry 2.*

C A P. XVII.

NULLUS vicecomes (1), constabularius (2), coronator (3), vel alii balivi nostri teneant placita coronæ nostræ.

NO sheriff, constable, escheator, coroner, nor any other our bailiffs, shall hold pleas of our crown.

(Mirror, 313.)

One of the mischiefs before this statute was, that none of them here named, could command the bishop of the diocese to give the delinquent his clergy, where he ought to have it, for as Bracton saith, *Nullus alius, præter regem, possit episcopo demandare, &c.* And therewith agreeth our other old, and later books, that the bishop is not to attend upon any inferiour court, nor that any inferiour court can write unto, or command the bishop, but the king (that is) the kings great courts of record, and such, as since that time have authority by act of parliament.

Braet. li. 3. fo. 106.
Brit. c. 104. fo. 248.
Fleta, li. 5. ca. 24.
3 E. 3. 59.
40 E. 3. 2.
14 H. 4. 27.
15 E. 3. conu-
sans 41.
14 H. 7. 26.
21 H. 7. 34. 35.
Regula.
Paich. 30 E. 1.
Coram Rege
Kanc. The
mayor and ba-
rons of the
5. Ports. compl.
in parliament.

Another cause was, that the life of man, which of all things in this world, is the most precious, ought to be tried before judges of learning, and experience in the laws of the realme: for *ignorantia iudicis est sepe numero calamitas innocentis. Et cum ex quo magna charta de libertatibus Angliæ alias concessa (quam quidem chartam dominus rex in parlamento suo apud Westm. an. regni sui 28. ad requisitionem omnium prælatorum, comitum, baronum, et communitatis totius regni, de novo concessit, renovavit, et confirmavit) placita coronæ ipsi domino regi specialiter reservantur, per quod nullus de regno huiusmodi placita tenere potest, seu habere, sine speciali concessione, post confirmationem chartæ prædictæ factæ.* In the same yeare, and terme, *coram rege*, a complaint by the abbot of Feversham, both cases

cases adjudged in the kings bench, whereunto they were referred by the parliament. See Michael. 17 Edw. 1. in Banco. Rotulo. 33. Southampton.

The chapter of *Magna Charta* here intended, and in both the said records expressed, is this 17 chapter of *Magna Charta* now in hand. By these records two things are to be observed. 1. That this is a generall law, by reason of these words, *Vel alii balivi nostri*, under which words are comprehended all judges or justices of any courts of justice. 2. Albeit it be provided by the ninth chapter of *Magna Charta*, *Quod barones de quinque portibus, et omnes alii portus habeant omnes libertates, et liberas consuetudines suas*; that these generall words must be understood of such liberties, and customes onely, as are not afterwards in the same charter by expresse words taken away, and resumed to the crown. And therefore if the maior and barons of the cinque ports had power before this act to hold pleas of the crown, yet by this act of the seventeenth chapter, they are abrogated, and resumed; a notable and a leading judgement. Both these records being within two years after the confirmation of king E. 1. of *Magna Charta*, are worthy to be read and observed.

(1) *Viccomes.*] See for his name, office, and antiquity in the first part of the Institutes, sect. 234.

(2) *Constabularius.*] Is here taken for *castellanus*, a *castellein*, or constable of a castle, for so doth the Mirror interpret. And *castellanus est qui custodit. castellum, aut est dominus castelli*; and so doth Bracton; *Debet, &c. ostendere castellano, sicut constabulario turris, &c.* And therewith agreeth Fleta, *Item nullæ prisæ capiuntur de aliquo per aliquem constabularium, castellanum, præterquam de villa, in qua situm est castrum.*

And the statute of W. 1. agreeth herewith, *Des prises, des constables, ou castelleins, faits des autres, &c.*

And *castellani* were men in those dayes of account, and authority, and for pleas of the crown, &c. had the like authority within their precincts, as the sheriffe had within his bailiwick before this act, and they commonly sealed (which I have often seen in many, and have cause to know, that some of the auncient family of *de Sperham* in *Norff.* did) with their portraiture on horseback.

Now for the number of castles, in ancient time, within this realme, *Certum est regis Henrici secundi temporibus castella 1115. in Anglia extitisse.*

And it is to be observed, that regularly every castle containeth a mannor: so as every constable of a castle, is constable of a mannor, and by the name of the castle the mannor shall passe, and by the name of the mannor the castle shall passe.

For this word, *constabularius*, his office, and antiquity, see the first part of the Institutes, sect. 379.

And albeit the franchises of infangthiefe, and outfangthiefe, to be heard and determined within court barons belonging to manors, were within the said mischiefe, yet we finde, but not without great inconvenience, that the same had some continuance after this act. But either by this act, or *per desuetudinem*, for inconvenience, these franchises within manors are antiquated and gone.

(3) *Coronator.*] His name is derived *a corona*, so called, because he is an officer of the crown, and hath conuſance of some pleas, which are called *placita coronæ*.

[31]

See Pasch.

33 E. 1.

coram Rege.

The prior of

Tinemouth's

case. Northum-

berl.

1 part Insti-

tutes, sect. 234.

248.

Mirror, cap. 5.

§ 2.

Bracton, lib. 5.

fo. 363. li. 2.

fo. 69.

Vide cap. 19.

Fleta, lib. 2. ca.

43.

W. 1. ca. 7. &

31.

See the first

part of the In-

stitutes, fol. 5.

verbo Holme.

Lamb. leg. Ed.

c. 26.

Bract. li. 3. fo.

154.

Brit. ca. 15. fo.

90.

Fleta, li. 1. ca.

47.

Hovend. pte. po-

sterior. fol. 345.

Mat. Par. anno

1259. 44 H. 3.

Pl. Parl. 18 E. 1.

Rot. 11.

2 R. 3. 10.

Mirror, cap. 1.
§ 3.

For his antiquity, see the Mirror, who (treating of articles established by the ancient kings, Alfred, &c.) saith, *Auxi ordains fuer coronours in chescun county, et viscounts a garder le peace, quant les countees soy demisterent del gard, et bayliffes in lieu de centeners* (that is) coroners in every county, and sheriffes were ordained to keep the peace, when the earles dismist themselves of the custody of the counties, and bailiffes in place of hundreders.

Brit. ca. 3. fol. 3.
Stam. Pl. Cor.
48. c.

[32]

For his dignitie and authority, Britton saith in the person of the king, *Pur ceo que nous volons, que coroners sont in chescun county principals gardens de nostre peace, a porter record des pleas de nostre corone, et de leur viewes, et abjurations, et de utlagaries, volons que ilz sont eslieus selonqu'e ceo, que est contein in nous statutes de leur election, &c.*

Rot. brevium.
5 E. 3. nu. 38.
Registr. 177.
W. 1. cap. 10.
* Registr. 177.

And a common merchant being chosen a coroner, was removed, for that he was *communis mercator*.

* By the auncient law, he ought to be a knight, honest, loyall, and sage, *Et qui melius sciat, et possit officio illi intendere*. For this was the policy of prudent antiquity, that officers did ever give a grace to the place, and not the place only to grace the officer.

Videa postea,
c. 35.
Glanv. li. 1. cap.
2. & lib. 14.
cap. 8.

But what authority had the sheriffe in pleas of the crown before this statute? this appeareth by Glanvill, that the sheriffe in the tourn (for that is to be intended) held plea of theft, for he saith; *Excipitur crimen furti, quod ad vicecomitem pertinet, et in comitatibus placitatur*; but he may enquire of all felonies by the common law, except the death of man.

W. 2. cap. 13.
22 E. 4. fol. 22.
Mirror, cap. 1.
§ Coroners. &
cap. 5. § 2.

And what authority had the coroner? the same authority he now hath, in case when any man come to violent, or untimely death, *super visum corporis*, &c. Abjurations, and out-lawries, &c. appeales of deaths by bill, &c. This authority of the coroner, viz. the coroner seley to take an indictment, *super visum corporis*; and to take an appeale, and to enter the appeale, and the count remaineth to this day. But he can proceed no further, either upon the indictment, or appeale, but to deliver them over to the justices. And this is saved to them by the statute of W. 1. cap. 10. And this appeareth by all our old books, book cases, and continuall experience.

Bracton, lib. 3.
fol. 121.
Brit. c. 1. fol. 3.
Fleta, li. 1. cap.
18. 25.

And for the further authority of the coroner in case of high treason, see the book of 19 H. 6. fol. 47. and consider well thereof.

22 Aff. 97, 98.
&c.
3 H. 7. cap. 3.
Stamf. Pl. co. 64.
116, 117.

But the authority of the sheriffe to heare and determine theft, or other felonies, by the common law (except the death of man) in the tourn is wholly taken away by this statute, howbeit his power to take indictments of felonies, and other mis deeds within his jurisdiction, is not taken away by this act.

W. 2. c. 13.
1 E. 3.
Stat. 2. ca. 17.
1 E. 4. 3 1 R. 3.
cap. 4.

C-A P. XVIII.

SI quis tenens de nobis laicum feodum moritur, et vic', vel balivus noster ostendat literas nostras patentes de summonitione [nostra] de debito, quod defunctus nobis debuit: liceat vic', vel balivo

IF any that holdeth of us lay-fee do die, and our sheriff or bailiff do shew our letters patents of our summon for debt, which the dead man did owe to us; it shall be lawful to our sheriff

balivo nostro attachiar', et imbreviare omnia bona et catalla defuncti inventa in laico feodo ad valentiam ipsius debiti, per visum et testimonium legalium hominum, ita tamen quod nihil inde amoveatur, donec persolvat nobis debit', quod clarum fuerit, et residuum relinquatur executoribus ad faciendum testamentum defuncti'. Et si nihil nobis debeatur ab ipso, omnia catalla cedant defuncti': salvo uxori ejus, et liberis pueris suis, rationabilibus partibus suis.

sheriff or bailiff to attach and inroll all the goods and chattles of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing thereof shall be taken away, until we be clearly paid off the debt; and the residue shall remain to the executors to perform the testament of the dead; and if nothing be owing unto us, all the chattles shall go to the use of the dead (saving to his wife and children their reasonable parts).

(Rast. Ent. f. 541. Co. Ent. f. 564. Fitz. Detinue, 52; 56, 58, 60. Bro. Ration. 2, 5, 6. Supra, cap. 8. 33 H.8. c. 39.)

By this chapter three things are to be observed; first, that the king by his prerogative shall be preferred in satisfaction of his debt by the executors, before any other: secondly, that if the executors have sufficient to pay the king's debt, the heir, that is to beare the countenance, and sit in the seate of his ancestor, or any purchaser of his lands shall not be charged. Thirdly, if nothing be owing to the king, or any other, all the chattells shall goe to the use of the dead, that is, to his executors, or administrators, saving to his wife and children their reasonable parts, which is consilium, and not præceptum; and the nature of a saving regularly is, to save a former right, and not to give, or create a new, and therefore, where such a custome is, that the wife and children shall have the writ *de rationabili parte bonorum*, this statute saveth it. And this writ doth not lye without a particular custome, for that the writ in the Register is grounded upon a custome, which (as hath been said) is saved by this act.

* But that it was never the common-law (though there be great variety in books) heare what Bracton saith, who wrote soone after this act, *Neq; uxorem, neq; liberos amplius capere de bonis defuncti patris vel viri mobilibus, quam fuerit eis specialiter relictum, nisi hoc sit de speciali gratia testatoris, utpote si bene meriti in ejus vita fuerint, &c. vix enim inveniretur aliquis civis, qui in vita magnum quæstum faceret, si in morte sua cogeretur invitatus bona sua relinquere pueris indoctis, vel luxuriosis, et uxori male meritis: et ideo necessarium est valde, quod illis in hac parte libera facultas tribuatur. Per hoc enim tollet malefium, animabit ad virtutem, et tam uxori, quam liberis bene faciendi dabit occasionem, quod quidem non fieret, si se scirent indubitanter certam partem obtinere etiam sine testatoris voluntate.*

But the administrators of a man that die intestate, or executor of any, that make no disposition of his whole personall estate, goods, debts, and chattells, the administrators or executors after the debts paid and will performed, ought not to take any thing to his or their owne use, but ought, though there be no particular custome, to divide them, according to this statute: and the said ancient, and latter authorities (then which there can be no better direction) may guide them therein: and this right doth this statute of *Magna*

Ockham Regist.

231. b.

17 E. 3. 73.

27 E. 3. 88.

[33]

29 E. 3. 13.

41 E. 3. 15.

41 E. 3. execut.

33.

4 E. 4. 16. F.N.B.

28. b.

33 H. 8. c. 39.

See before cap. 8.

Mirror, cap. 5.

Glanv. lib. 12.

c. 20.

Bracton, l. 2.

fol. 60. b.

Fleta, l. 2. cap.

50.

Regist. 142.

34 E. 1. detinue

60.

1 E. 2. ib. 56.

17 E. 2. ib. 58.

30 E. 3. 2. 26.

31 E. 3. m'der. 6.

39 E. 3. 6. 10.

17 E. 3. 17.

40 E. 3. 38.

3 E. 3. det. 156.

1 E. 4. 6.

7 E. 4. 21.

13 H. 4.

Sever. 30.

31 H. 8. Ration.

nab. parte Bro. 6.

Bract. l. 2. fol.

61. Note the

reason hereof

maketh against

perpetuities.

Charta save by these words, *salvis uxori, et liberis suis, rationabilibus partibus suis*. So as though the statute doth give no action, yet their parts are saved hereby; which by *Glanville*, and other ancient authors appear to belong to them; and the executor, or administrator shall be allowed of this distribution, according to this statute, upon his account before the ordinary.

CAP. XIX.

NULLUS constabularius, vel ejus balivus capiat blada, vel alia catalla alicujus, qui non sit de villa, ubi castrum suum situm est, nisi statim reddat denarios, aut respectum inde habere possit de voluntate venditoris: Si autem de villa illa fuerit, infra quadraginta dies precium reddat.

NO constable, nor his bailiff, shall take corn or other chattles of any man, if the man be not of the town where the castle is, but he shall forthwith pay for the same, unless that the will of the seller was to spite the payment; and if he be of the same town, the price shall be paid unto him within forty days.

(Mirror, 313. 3 Ed. 1. c. 7. Altered by 13 Car. 2. stat. 1. c. 8.)

See W. 1. cap. 7.
& 31.

Mirror, cap. 5.
§ 2.

Here also it appeareth, that in this chapter *constabularius* is taken for *castellanus*: and this taking by *castelleins*, though the castell was kept for the defence of the realme, was an unjust oppression of the subject, and this expressly appeareth by the Mirror, *Ceo que est defendu a constables a prender le autre, defend droit a tous gentes de cy que nul difference parenter prise d'autrui maugre soen, et robbery, lequel cel prise soit de chevalls, de vitaille, de marchandise, de cariage, de ostiels, ou des autres manners de biens*. And this appeareth also by Fleta, l. 2. cap. 43. *Quia multa gravamina multis inferuntur per diversas districtiones, quæ quidem sub colore prisarum advocantur, &c. inhibetur in Magna Charta de libertatibus, &c. no purveyance* shall be taken, but only for the houses of the king, and queene, and for no other person: so as the grievance before this, and other like acts, is wholly taken away.

[34]

36 E. 3. cap. 2.
23 H. 6. cap. 2.

CAP. XX.

NULLUS constabularius distringat aliquem militem ad dandum denarios pro custodia castri, si ipse eam facere voluerit, in propria persona sua, vel per alium probum hominem faciat, si ipse eam facere non possit, propter rationabilem causam. Et si nos abducerimus, vel miserimus eum in exercitum, sit quietus de custodia castri, secundo

NO constable shall distrain any knight for to give money for keeping of his castle, if he himself will do it in his proper person, or cause it to be done by another sufficient man, if he may not do it himself for a reasonable cause. And if we do lead or send him in an army, he shall be free from castleward

cundum quantitatem temporis, quo per nos fuerit in exercitu, de feod' pro quo fecit servitium in exercitu.

ward for the time that he shall be with us in fee in our host, for the which he hath done service in our wars.

(1 Inst. 70. a. 12 Car. 2. c. 24.)

Here *constabularius* is taken in the former sense: see the first parte of the Institutes, Sect. 96.

See this act in Fleta: and note, this act (consisting upon two branches) is declaratory of the common law, for first, that he, that held by castle gard, that is, to keepe a tower, or a gate, or such like of a castle in time of warre might doe it, either by himselfe, or by any other sufficient person for him, and in his place. And some hold by such service, as cannot doe it in person, as major and comminallty, deane and chapter, bishops, abbots, &c. Infants being purchasers, women, and the like, and therefore they might make a deputy by order of the common law. If two joyn-tenants hold by such service, if one of them performe, it is sufficient.

Fleta, lib. 2. ca. 43.

See the 1. part of the Instit. 96.

For the second; if such a tenant be by the king led, or sent to his host, in time of warre, the tenant is excused and quit of his service for keeping of the castle, either by himselfe, or by another during the time, that he so serve the king in his host, for that when the king commandeth his service in his host, he dispenceth with his service, by reason of his tenure, for that one man cannot serve in person in two places, and when he serves the king in person in one place, he is not bound to finde a deputy in the other, for he is not bound to make a deputy, but at his pleasure, and this is also declaratory of the ancient common law. See the first part of the Institutes, 111. 121.

C A P. XXI.

NULLUS vicecomes, vel balivus noster, vel aliquis alius, capiat equos, vel carectas alicujus pro caria-gio faciendo, nisi reddat liberationem antiquitus statutam, scilicet pro una carecta ad duos equos decem denarios per diem, et pro carecta ad tres equos quatuordecim denarios per diem. Nulla carecta dominica alicujus personæ ecclesiasticæ, vel militis, vel alicujus * domini, per balivos nostros capiatur, nec nos, nec balivi nostri, nec alii, capiemus boscum alienum ad castra, vel ad alia agenda nostra, nisi per voluntatem illius, cujus boscum ille fuerit.

NO sheriff nor bailiff of ours, or any other, shall take the horses or carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, x. d. a day; for three horse, xiv. d. a day. No demesne cart of any spiritual person or knight, or any lord, shall be taken by our bailiffs; nor we, nor our bailiffs, nor any other, shall take any man's wood for our castles, or other our necessities to be done, but by the licence of him whose the wood is.

* [35]

(W. 1. c. 1. verb. & que nul face, &c. Artic. super cart. cap. 2. Regist. fol. 98. Bracton lib. 3 fol. 177. Britton fol. 33. 36. 38. Fleta, lib. 1. c. 20. see cap. Itineris. 3 Bullst. 4. 14 Ed. 3. stat. 2. c. 19. 25 Ed. 3. stat. 5. c. 6. 13 Car. 2. stat. 1. c. 8.)

This

This chapter consisteth of three branches, the first setteth down the auncient hire or allowance for the carriage for the king; the second setteth down, who are exempted from that carriage; the third, concerning purveyance of wood.

W. 1. cap. 1. &
32. 36 E. 3. cap.
2. 38 H. 6. cap.
2. Fleta, lib. 2.
ca. 1. & 24.
32 E. 3. Barre
259. 7 H. 3. tit.
Waite.

For the first, the carriage must be taken for the king, and queen onely, and for no other, implied in these words, *Nullus vicecomes vel balivus noster*, and this is explained by divers other statutes, and by our books.

The hire or allowance is certainly expressed, as aunciently due, *Reddat liberationem antiquitus statutam*; so as this also is declaratory of the auncient law, and the hire or allowance ought to be paid in hand, for the statute saith, *Nullus capiat, &c. nisi reddat, &c.*

And this *liberatio antiquitus statuta*, is (as it appeareth by this act) *per diem*, by the day.

Aver-penny; and *averagium*, are words common in auncient charters, and signifie to be free from the kings carriages, *cum averiis*, and this is meant where it is said, *Aver-penny, hoc est, quietum esse de diversis denariis pro * averagiis domini regis.*

Rastall * i. car-
ragiis cum ave-
riis.

W. 1. cap. 1.
14 E. 3. cap. 1.
1 R. 2. cap. 3.
10 E. 2. Vet.
Mag. Chart. pt.
2. fo. 46. Fleta,
lib. 3. cap. 5.

For the second branch: no demean, or proper cart for the necessary use of any ecclesiasticall person, or of any knight, or of any lord, for or about the demean lands of any of them, ought to be taken for the kings carriage, but they are exempted by the auncient law of England from any such carriage.

This statute extendeth not to any person ecclesiasticall, of what estate, order, or degree soever: and this was an auncient priviledge belonging to holy church.

Also it extendeth to all degrees, and orders of the lesser, and greater nobility, or dignity, as of knighthood, dukes, marquesses, earles, viscounts, and barons, for albeit there were no dukes, marquesses, or viscounts within England at the making of the statute, yet this statute doth extend to them, for they are all *domini*, lords of parliament, and of the barony of England; and this also was an ancient priviledge belonging to these orders and dignities: and all this concerning the ecclesiasticall and temporall state was (amongst other things for the advancement and maintenance of that great peacemaker, and love-holder, hospitality) one of the auncient ornaments, and commendations of the kingdome of England.

W. 1. cap. 1. &
32. See 25 E. 3.
ca. 6. 35 H. 8.
cap. 17. 5 Eliz.
cap. 8. 7 H. 3.
tit. Wa. 141.
11 H. 4. 28 Pl.
Com. 322.
42 E. 3. cap. 1.
Mic. 2. Já. re-
solved 11 H. 4.
fo. 28. No pur-
veyance of gra-
vell, because it
is part of the in-
heritance.

See 47 E. 3.
fo. 18. Issue
taken upon the
sale of timber
for reparation of
Calais.

[36]

The third branch is, that neither the king, nor any of his baylies, or minist'ers, shall take the wood of any other, for the kings castles, or other necessities to be done, but by the license of him whose wood it is. And all statutes made against this branch (amongst others) before the parliament of 42 E. 3. are repealed: and this branch, amongst others, hath (as hath been said) been confirmed, and commanded to bee put in execution at 32 sessions of parliament. And so it was resolved by all the judges of England, and barons of the exchequer, Mich. 2 Jac. Reg. upon mature deliberation; and that the kings purveyor could take no timber, growing upon the inheritance of the subject, because it was parcell of the inheritance, no more then the inheritance it selfe. Whereof the king, and counsell being informed, the king by his proclamation, by advise of his counsell, under the great seale, 23 Aprilis, anno 4. declared the law to be in these words: first, when we were informed, that some inferior minist'ers had presumed to goe so farre beyond their commission, as they have adventured, not onely to take timber trees growing, which being parcell of our subjects inheritance,

inheritance, was never intended by us to be taken without the good will, and full consent of the owners, but have accustomed also to take greater quantities of provisions for our house, and stable, then ever came, or were needfull, to our use, &c. As by the said proclamation bearing date 23 Aprilis, anno 4 Jac. Reg. appeareth. And divers purveyors were according to the said resolution of the judges punished in the starchamber, for purveying of timber growing, without the consent of the owners.

Boscus is an ancient word used in the law of England, for all manner of wood, and the Italian useth the word *bosco* in the same sense, and the French, *boys*, accordingly. *Boscus* is divided into two sorts, viz. high wood, *haut-boys*, or timber, and coppice-wood (so called, because it is usually cut) or under wood. High-wood is properly called *Saltus*, quia arbores ibi exiliunt in altum. It is called in Fleta, *maeremium*.

Fleta, ubi supra.
Pl. Com. 236.

The common law hath so admeasured the prerogative of the king, as he cannot take, nor prejudice the inheritance of any, and (as hath been said) a man hath an inheritance in his woods.

And see the statute of Marlebridge, anno 52. H. 3. *Magna Charta in singulis teneatur, tam in hiis, quæ ad regem pertinent, quam ad alios*, and 31 other statutes. So as all pretence of prerogative against *Magna Charta* is taken away.

Marlebr. cap. 5.

See hereafter the exposition of the statute *De tallagio*, anno 34 E. 1. & *de prisis*, anno 18 E. 2. vet. *Magna Charta*. fol. 125. 1 part.

34 E. 1. Vet.
Magna Charta.
fol. 37. 2. Part.

C A P. XXII.

NOS non tenebimus terras (1) illorum, qui convicti fuerint (2) de feloniam (3), nisi per unum annum, et unum diem, et tunc reddantur terræ illæ dominis feodorum.

WE will not hold the lands of them that be convict of felony but one year and one day, and then those lands shall be delivered to the lords of the fee.

(Mirror, 313.)

This appeareth by Glanvill, to be due to the king by his ancient prerogative, for he saith, *Sin autem de alio, quam de rege tenuerit is, qui utlagatus est, vel de feloniam convictus. tunc quoque omnes res suas mobiles regis erunt, terra quoque per unum annum remanebit in manu domini regis, elapso autem anno, terra eadem ad rectum dominum, scilicet ad ipsum de cuius feod. est, revertetur, veruntamen cum domorum subversione, et arborum extirpatione.*

Glanv. li. 7.
ca. 17. fol. 59.

This chapter of *Magna Charta* doth expresse that, which doth belong to the king, viz. the yeare, and the day, and omit the waste, as not belonging to him, and this is notably explained by our ancient books with an uniforme consent: Bracton treating of the yeare, and the day in this case due to the king, saith, *Sed quæ sit causa, quare terra remanebit in manibus domini regis? Videtur quod talis est, quia revera, cum quis convictus fuerit de aliqua feloniam, in potestate domini regis erit, prosterndi ædificia, extirpandi gardina, et arandi prata, et quoniam huiusmodi verterentur in grave damnum domi-*

Bracton lib. 3.
fol. 129. & 137.

norum,

Nota.
Provisum fuit.

uorum, pro communi utilitate provisum fuit, quod hujusmodi ædificia, gardina, et prata remanerent, et quod dominus rex propter hoc haberet commoditatem totius terræ illius per unum annum, et unum diem, et sic omnia cum integritate reverterentur in manus dominorum capitalium, nunc autem petitur utrumque, scilicet finis pro termino, et similiter pro vasto, et non video rationem quare, &c.

Britton, cap. 5.
fol. 14.

And Britton treating of this very matter, saith, *Lour biens mobiles sont les nous, et lour heires disherit. et voilons aver leur tenements de qui que unques sont tenus le an, et le jour, issint que lour heritages, demourgent un an et un jour in nostre maine, si que nous ne faisons estre perie les tenements, ne gaster les boys, ne arer les prees, sicome lensoit faire in remembrance des felons attaints, &c.*

[37]

Fleta, li. 1. cap.
23.

Fleta saith, *Si autem utlagati, vel alii convicti terram liberam habuerint, illa statim capienda est in manus regis, et per unum annum, et unum diem tenend. ad capitales dominos post illum terminum re-versura, et hoc habetur ex statuto Magnæ Chartæ, quod tale est, nos non tenebimus terras illorum, qui convicti fuerint de feloniam, nisi per unum annu, et unum diem, et tunc reddantur terræ illæ dominis feodorum, causa vero talis termini regis, quia in signum feloniam olim provisum fuit, quod ædificia talium prosternerentur in terram, extirperentur gardina, ararentur prata, truncarentur bosci, et quoniam hujusmodi reverterentur in grave damnum dominorum feodorum, pro communi utilitate provisum fuit, quod hujusmodi dura, et gravia cessarent, et quod rex propterea per annum et diem totius terræ commoditatem perciperet, secus autem, si terra non esset eschaeta dominorum, post quem terminum dominis proprietariis integre absque vasto vel destructione reverterentur.*

Nota.

Nota.

Mirror, cap. 5.
§ 2.

The Mirror speaking of this chapter, saith, *Le point des terres aux felons tener per un an, est desuse, car p. la ou le roy ne duist aver q. le gast de droit, ou lan in nosme de fine, par salver le fief de lestripment, preignent les ministres le roy ambideux.* Upon all which it appeareth, that the king originally was to have no benefit in this case, upon the attainder of felony, where the free-land was holden of a subject, but onely in detestation of the crime, *ut pœna ad paucos, metus ad omnes perveniat*, to prostrate the houses, to extirpe the gardens, to eradicate his woods, and to plow up the meadows of the felon, for saving whereof, *et pro bono publico*, the lords, of whom the lands were holden, were contented to yeeld the lands to the king for a year, and a day, and therefore not only the waste was justly omitted out of this chapter of *Magna Charta*, but thereby it is enacted, that after the year and day, the land shall be rendred to the lord of the fee, after which no waste can be done.

And where the treatise of *Prærogativa Regis*, made in 17 Ed. 2. saith, *Et postquam dominus rex habuerit annum, diem, et vastum, tunc reddatur tenementum illud capitali domino feodi illius, nisi prius faciat finem pro anno, die, et vasto.* Which is so to be expounded, that forasmuch, as it appeareth in the said old books, that the officers, and ministers, did demand both for the waste, and for the year, and day, that came in lieu thereof, therefore this treatise named both, not that both were due, but that a reasonable fine might be paid for all that, which the king might lawfully claim. But if this act of 17 E. 2. be against this branch of *Magna Charta*, then is it repealed by the said act of 42 E. 3. cap. 1.

Vide Stamford.
Pl. Cor. 190,
191. Vide 3 E. 3.
coron. 327.
3 E. 3. ibid. 53.
3 E. 3. ibid.
370.

Hereby it also appeareth, how necessary the reading of auncient authors is for understanding of auncient statutes. And out of these old books, you may observe, that when any thing is given to the king

king in lieu, or satisfaction ~~on~~ an auncient right of his crown, when once he is in possession of the new recompence, and the same in charge, his officers and ministers will many times demand the old also, which may turn to great prejudice, if it be not duly, and discreetly prevented.

Pasc. 31 E. 1.
Cor. Rege
Norff. Wil. de
Ormesby.

(1) *Nou tenebimus terras.*] If there be lord, mesne, and tenant, and the mesne is attainted of felony, the lord paramount shall have the mesnalty presently. For this prerogative belonging to the king extends onely to the land, which might be waisted, in lieu whereof the yeare and day was granted.

And this is to be understood when a tenant in fee-simple is attainted, for when tenant in taile, or tenant for life is attainted, there the king shall have the profits of the lands, during t^{he} life of tenant in taile, or of the tenant for life.

(2) *Convicti fuerint.*] Here *convicti* in a large sense is taken for *attincti*, for the nature, and true sense of both these words, see the first part of the Institutes, and likewise for this word felony there.

See the first part
of the Institutes,
sect. 745.

(3) *De feloniam.*] Must be understood of all manner of felonies punished by death, and not of petit larceny, which notwithstanding is felony.

[38]

C A P. XXIII.

OMNES kidelli (1) *deponantur de cætero penitus per Thamesiam et Medewein per totam Angliam nisi per costeram maris.*

ALL weares from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the sea-coasts.

(25 E. 3. cap. 4. 1 H. 4. cap. 12. 12 E. 4. cap. 7. 10 Rep. 138. 13 Rep. 35. 12 Ed. 4. c. 7.)

Rex, &c. Noveritis nos pro communi utilitate civitatis nostræ London' et totius regni nostri concessisse, et firmiter præcepisse, ut omnes kidelli qui sunt in Tamisia, vel Medeweia, ubicunque fuerint in Tamisia, vel in Medeweia, amoveant', et non de cætero kidelli alicubi ponant' in Tamisia, vel in Medeweia, super forisfactur' decem libr' sterlingorum: quietum etiam clamavimus omne id, quod custodes turr' nostræ London' annuatim percipere solebant de prædictis kidellis: Quare volumus et firmiter præcipimus, ne aliquis custos præfat' turr' aliquo tempore post hoc, aliquid exigit ab aliquo, nec aliquam demandam, aut gravamen, sive molestiam. alicui inferat occasione prædictorum kidellorum, satis enim nobis constat, et per fideles nostros sufficienter nobis datum est intelligi, quod maximum detrimentum, et incommodum prædictæ civitati London', nec non et toto regno nostro occasione prædictorum kidellorum perveniebat; quod ut firmum, et stabile perseveret imperpetuum, præsentis paginæ inscriptione et sigilli nostri appositione communimus, sicut carta domini regis Johannis patris nostri quam barones nostri London' inde habent rationabiliter testat'.

Rot. cart.
18 Feb. Anno
11 H. 3.

(1) *Kidelli.*] Kidels is a proper word for open weares whereby fish are caught.

Lib. 10. fo. 138.
in the case of
Chester Mill.
Keylw. 15 H. 7.
15.

It was specially given in charge by the justices in eire, that all juries should enquire, *De hiis qui piscantur cum kidellis et skartellis.*

Cap. Itineris,
nu. 5. Tr. 5 E. 2.
Coram Rege.
Rot. 18.

And

Glanv. li. 9.
ca. 11.

And it appeareth by Glanvill, that this *pourpresture* was forbidden by the common law, for he saith, *Dicitur autem purprestura, vel porprestura proprie, quando aliquid super dominum regem injuste occupatur, ut in dominicis regis, vel in viis publicis obstructis, vel in aquis publicis transversis a recto cursu, vel quando aliquis in civitate super regiam plateam aliquid ædificando occupaverit, et generaliter, quoties aliquid fit ad nocumentum regii tenementi, vel regie viæ, vel civitatis*, and every publique river or streame, is *alta regia via*, the kings high-way.

Pourpresture commeth of the French word *pourprise*, which signifieth a close, or inclosure, that is, when one encroacheth, or makes that severall to himselfe, which ought to be common to many.

[39]

C A P. XXIV.

BREVE (1) *quod dicitur præcipe in capite, de cætero non fiat alicui de aliquo libero tenementò, unde liber homo perdat curiam suam.*

THE writ that is called *præcipe* in capite shall be from henceforth granted to no person of any freehold, whereby any freeman may lose his court.

(Mirror, cap. 5. §. 2. Bracton lib. 5. fol. 328. & 414 b. Registr. 4. 3 E. 3. 23. 6 E. 3. 15. 38 E. 3. 13. 39 E. 3. 26. F. N. B. 5. c. 38 Ed. 3. f. 13. 13 Rep. 42. F. N. B. fol. 5, 12, 39. h.)

This is for reformation of an abuse; and wrong offered to the lord, of whom the land was holden, and yet upon this statute, the tenant cannot pleade, that the lands are not holden of the king in chiefe, for two causes, first for that this act was made for the benefit of the lord, of whom this land is holden, and he cannot pleade it, because he is an estrang', and if one claiming to be lord should be admitted, another might come in and pretend the like, and so infinite. Secondly, this act extends to the chancery, for the words be *Breve, &c. non fiat*, so in that court the writ is made: and therefore when the writ is granted in the chancery, and returned into the court of common pleas, that which is by this act prohibited in the chancery, extendeth not to the court of common pleas; and therefore they cannot admit of such a plea: now the tenant, least he be concluded, must take the tenure by protestation, and the king, though he be not party to the record, yet shall he take advantage of the estoppel, for he is ever present in court.

And since this statute, no man ought to have this writ out of the chancery upon a suggestion, but oath must be made, before the granting thereof, that the land is holden of the king in *capite*.

See Mich. 4 E. 1. *de banco Rot.* 114. Norff. Barth. *de Redhams case, pro terris in curia comitis warren apud Castleacre, notabile recordum super hoc statutum. Per breve præcipitur justiciariis quod inquirent, si terræ tenentur de rege in capite.* See the writ in the Register, 4. b. by which writ power is given to the justices, that if it may appeare to them, that the land is not holden in *capite*, then that the plea be holden in the lords court, according to this statute. And for that the demandant Peter Grellye confessed that the

*

lands

20 E. 3. estoppel. 187. 22 E. 3. 17. 40 E. 3. 30.

Mic. 7. E. 1. in banco rot. 65. Lanc'. acc'. Peter Grellyes case.

lands were not holden of the king in *capite*, but of Edmond brother of the king, thereupon the entrie was, *Ideo Petrus perquirat sibi per breve de recto pat' in curia ipsius Ed. versus R. si voluerit.* Mich. 14. E. 1. Rot. 48. Som. acc. Regist. fo. 4. b. & 6. a.

And the lord, of whom the land is holden, shall upon this statute, have his writ of disceit against the demandant, which have recovered by default, and recover his damages, but the record of the judgement shall stand in force; and concerning the conclusion of the tenure, the lord shall have remedy against the king by petition of right. But if the recovery be given upon triall against the tenant, then the tenant hath concluded himself: for the tenure, because his protestation cannot availe him, when his plea is found against him: but the lord may have in that case, his action against the tenant, and his petition of right to the king, to be restored to his seigniorie, and by that meanes the tenant himselfe may be relieved.

(1) *Breve.*] *Dicitur ideo breve, quia rem de qua agitur, et intentionem petentis paucis verbis breviter enarrat, sicut faciat regula juris, quæ rem, quæ est, breviter enarrat.*

Breve quidem cum sit formatum ad similitudinem regulæ juris, quia breviter et paucis verbis intentionem proferentis exponit et explanat, sicut regula juris rem quæ est breviter enarrat.

And Fleta defines a writ, *totidem verbis*, as Braeton hath done.

There is a great diversity betweene a writ, and an action (although by some they are often confounded) which will best appeare by their severall definitions.

Actio nihil aliud est, quam jus prosequendi in judicio quod alicui debetur.

And with Braeton agreeth Fleta.

Actio nihil aliud est, quam jus prosequendi in judicio quod alicui debetur, et quod nascitur ex maleficio, vel quod provenit ex delicto, vel injuria.

And the Mirror saith, *Action nest aut' chose que loiall demand de son droit. Aitors sont queux suont leur droit per pleint, &c.*

So as the first diversity between an action, and a writ is, that an action is the right of a suite, and the writ is grounded thereupon, and the meane to bring the demandant or pl' to his right.

The second diversity, a writ grounded upon right of action is ever in *foro contentioso*, but so are not all writs, for that writs are much more large, then actions are, as shall appeare by the division of writs.

Of writs grounded upon rights of action, some be criminall, and some be civill or common.

Of criminall, some be in *personam*, to have judgement of death, as writs of appeale, of death, robberie, rape, &c. and some to have judgement of dammage to the partie, fine to the king; and imprisonment, as writs of appeale of mayhem, &c.

Of writs civill or common, some be reall. some personall, and some mixt. And of these, some be originall, and all they goe out of the chancery, and some judiciall, and they issue out of the court, where the plea depended. Some conditionall, as writs of error, redissin, &c. some without condition, some retornable, and some not retornable. And all these are warranted, either by the common law, or grounded upon some act of parliament. Which are so well knowne, as this little touch shall suffice.

Of originall writs, some be *brevia formata*, and some *ex cursu*, some *magistralia*, et *sæpius variantur*.

8 E. 4. 6. 6 E.
3. 15. Vet. N.B.
17. a. F.N.B.
98. n.

See the first part
of the Institutes,
sect. 192. 17 E.
3. 31. 36. 37.
59. 32 E. 3.
Avowry 113.
46 E. 3. petition
9.

Braet. lib. 3.
f. 112. cap. 12.
nu. 2. & lib. 3
fol. 413. c. 17.
nu. 2.

Fleta, lib. 2.
c. 12. § dicuntur
etiam brevia.

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Braeton, lib. 3.
fol. 98. b. cap. 1.

Fleta, lib. 1.
cap. 16. § actio
& § 3. Aitors.
Mirror, cap. 2.
§ 1. next.

Braeton, lib. 3.
fol. 101. cap. 3.
nu. 1. Fleta lib.
1 cap. 16.

Glanvil. lib. 1.
c. 1. Braeton ubi
sup. Fleta ubi
sup. Mirror ubi
sup. Plowd.
Com. 73. &c.
Regist. 187.

Braet. 1. 5. 413.
b. Fleta, lib. 2.
cap. 12.

Regularly

^a Dier, 23. Fitz.
377. a.
^b F.N.B. 28,
29.

Regularly the kings writs are, *ex debito iustitiæ*, to be granted to the subject, which cannot be denied; and some be *ex gratia*, as ^a speciall liveries, and ^b writs of protections for the safeguard of the subject, being in the kings warre out of the realme.

^c Regist. 227.
^d Ibid. 267.
^e Regist. 133. b.
Fitz. N.B. 185.
Regist. 206.
F.N.B. ib.

In nature of commissions; as writs of error, of oier, and terminer, of election of knights and burgeses of the parliament, of election of a coroner, or of discharging of him, of election of verderers, *c de ventre inspiciendo*. ^d *De viis et venellis mundandis*, Regist. 267. Of the surety of the good behaviour, or of the peace. ^e *De odio et atia*. Association of *de admittendo in socium*, of *si non omnes*, and the like. Writs of *iusticies*.

Of writs of *præcipe*, some be, *quod reddat*, as writs of right, &c. debt, &c. Some be *quod permittat*, as writs *de quod permittat*. Some be *quod faciat*, as *de consuetudinibus et servitiis*. *De domo reparanda*. And of writs of *præcipe*, some containe severall precepts, and some joyn, and some are sole.

Regist. 295.
F.N.B. 170.
Regist. 294.
F.N.B. 165. a.
F.N.B. 85. a.
Regist. 58. b.
Artic. sup. cart.
c. 6. Regist.
187. b. *ibid*.
179. a. F.N.B.
240. d.

[4.1]

^a F.N.B. 153.
b. 2 E. 3. ca. 8.
5 E. 3. ca. 9.
14 E. 3. cap. 14.
Regist. fo. 186.
F.N.B. 153.
Regist. 18.
F.N.B. 20.

^b Regist. 124,
125. *revocat*
brevis de au-
diendo &c. All
Writs of super-
seas.

^c Pl. com. fol.
73. &c. See
12 H. 4. 24. in
debt not cited
in that case.
Regist. 114,
115. Writs of
audita querela
&c. prohibitions
ad jura regal.

^d Regist. 267. a.
^e *ib*. 126. b.
^f *ib*. 193. b.
193. a. b.

Writs mandatory, and extrajudiciall, whereof some be affirmative, and some negative. Affirmative, as calling of men to the upper house of parliament to be peers of the realme. *De comitat' commissis*. Regist. 295. Of *conge de eslier*, licence to choose a bishop. Regist. 294. b. *De regio assensu*. Regist. *ibid*. To call one to be chiefe iustice of England. To call apprentices of law to be serjants. *De brevibus et rot. deliberandis*. Regist. 295. *De restitutione spiritualium*. Regist. 294. b. Negative, as *de non ponendis in assis*, et *juratis*. *De securitate inveniendâ, quod se non diveriat ad partes externas sine licentia*. *De non residentia clerici regis*. *De clerico infra sacros ordines constituto non eligendo in officium*. *Ne fines capias pro non pulbre placitando*.

Of writs, some are for furtherance of justice, and for ousting of delays, and to proceed. As the writ *de procedendo ad iudicium*, that the justices shall not surcease to doe common right, for no commandement under the great seale, petit seale, or message from the king. Or ^a if the judges of themselves delay judgement, there lyeth also a *procedendo ad iudicium*. Againe, there is a *procedendo in loquela, et ad iudicium*, after aid of the king. A writ *de executione iudicii*.

^b Some for advancement of justice not to proceed.

^c Regularly writs are directed to the sheriffes, or coroners, but in speciall cases to the partie, or others. To the partie, as writs of prohibitions, *ne exeat regnum*. To others, as to judges temporall, ecclesiasticall, and civill. To serjeants at armes. To the ^d party that hath the custody of an idiot. To the ^e major, and bailiffes, &c. *ad amovendum eos ab officio, quousq; inquisitio foret de eorum gestu*. ^f *Liberate thesaurario, et camerariis, thesaurario et baronibus*.

Note of writs of right (whereof the *præcipe in capite* is one) some be close, and some be patent.

Writs of right returnable into the court of common pleas be patent, and writs directed into auncient demesne, are close; and the reason wherefore in other courts of the lords, the writs shall be patent, is, because there is a clause in those writs, *et nisi feceris, vicecomes N. hoc faciat, ne amplius clamorem audiamus pro defectu recti*: which clause is not in the other writs, and necessary it is that such writs should be patent, that the sheriffe might take notice thereof.

CAP. XXV.

UNA mensura vini per totum regnum nostrum, et una mensura cer-visiæ, et una mensura bladi, scilicet; quarterium Londⁿ, et una latitudo pannorum (1) tinctorum, ruffatorum, et haubergettarum, scilicet duæ ulnæ infra listas. De ponderibus vero sic sicut de mensuris.

ONE measure of wine shall be through our realm, and one measure of ale, and one measure of corn, that is to say, the quarter of London: and one breadth of dyed cloth, rufflets, and habergeants, that is to say, two yards within the lists. And it shall be of weights as it is of measures.

(14 Ed. 3. stat. 1. c. 12. 27 Ed. 3. stat. 2. c. 10. 8 H. 6. c. 5. 11 H. 7. c. 4. 16 Car. 1. c. 19.)

This act concerning measures and weights, that there should be one measure and one weight through England, is grounded upon the law of God. *Non habebis in sacculo diversa pondera, majus, et minus, non erit in domo tua modius major et minor, pondus habebis iustum et verum, et modius æqualis erit tibi, ut multo vivas tempore super terram, &c.* And this hath often by authority of parliament been enacted, but never could be effected, so forcible is custome concerning multitudes, when it hath gotten an head, therefore good lawes are timely to be executed, and not in the beginning to be neglected.

For weights and measures, there are good lawes made before the conquest: *in dimensione, et pondere nihil esto iniquum, ab iniquitate vero deinceps quisq; temperet: per commune concilium regni statuimus, quod habeant per universum regnum mensuras fidelissimas, et signatas, et pondera fidelissima, et signata, sicut boni prædecessores statuerunt.*

(1) *Una latitudo pannorum, &c.*] True it is that broad cloathes were made, though in small number, at the time, and long before this statute, but in the beginning of the raigne of Edward 3. the same came to so great perfection, as in the 11. yeare of his raigne, all men were prohibited to bring in privilie, or apertly by himselfe, or any other, any clothes made in any other places, &c. And this is the worthiest and richest commoditie of this kingdome, for divide our native commodities exported into tenne parts, and that which comes from the sheepes back, is nine parts in value of the tenne, and setteth great numbers of people on worke. For the breadth, and length of clothes, see many statutes made after this act.

Stat. de 31 E. 1.
14 E. 3. cap. 12.
27 E. 3. cap. 10.
See the Custum.
de Norm. cap.
16. Deutr. 25.
v. 13, 14.

Int' leges Canut.
cap. 9.
Int' leges Will.
Regis conq.^a

Mirror, cap. 5.
§ 2. Vet. Mag.
Cart. cap. lxx.
f. 151. 11 E. 3.
cap. 3.

[42]

CAP. XXVI.

NIHIL de cetero detur pro brevi inquisitionis (1) ab eo, qui inquisitionem petit de vita, vel de membris, sed gratis concedatur, et non negetur.

NOTHING from henceforth shall be given for a writ of inquisition, nor taken of him that prayeth inquisition of life, or of member, but it shall be granted freely, and not denied.

(3 Ed. 1. c. 11. 13 Ed. 1. stat. 1. c. 29. Mirror, 314. Regist. 133, 134.)

Mirror, cap. 5.
§ 2. Regist. fol.
133. Glanv. lib.
14. c. 3. Bract.
1. 3. f. 121.
Fleta, lib. 1. c.
23. 25 W. 1.
cap. 11. Glouc.
c. 9. W. 2. cap.
29. Hill. 32
E. 1. coram
Rege Rott. 71.
& 79. 5 H. 7. 5.

(1) *Brevi inquisitionis.*] That is the writ *de odio et atia*, anciently called *brevé de bono et malo*, and here, of life, and member, which the common law gave to a man, that was imprisoned, though it were for the most odious cause, for the death of a man, for the which, without the kings writ he could not be bayled, yet the law favouring the liberty, and freedom of a man from imprisonment, and that he should not be detained in prison, untill the justices in eire should come, at what time he was to be tried, he might sue out this writ of inquisition directed to the sherife, *quod assumptis tecum custodibus placitorum coronæ in pleno comitatu per sacramentum proborum, et legalium hominum de &c. inquiras (inde appellatur breve inquisitionis) utrum A. captus, et detentus in prisona &c. pro morte W. unde rettatus (1. accusatus existit) rettatus sit odio, et atia &c. nisi indicatus vel appellatus fuerit, coram justitiariis nostris ultimo itinerantibus in partibus illis, & pro hoc captus, et imprisonatus, for by the common law, in omnibus autem placitis de feloniam, solet accusatus per plegios dimitti, præterquam de placito de homicidio, ubi ad terrorem aliter statutum est.* In this writ, fower things are to be observed.

Glanv. lib. 14.
c. 1.

First, though the offence, whereof he was accused, were such, as he was not bayleable by law, yet the law did so highly hate the long imprisonment of any man, though accused of an odious, and heynous crime, that it gave him this writ for his reliefe.

Secondly, If he were indited, or appealed thereof, before the justices in eyre, he could not have this writ, because this writ was grounded upon a surmise, which could not be received against a matter of record.

Thirdly, Upon this writ, though it were found, that he was accused *de odio et atia*, and that he was not guilty, or that he did this act *se defendendo, vel per infortunium*, yet the sherife by this writ had no authority to bayle him, but then the party was to sue a writ *de ponendo in ballium*, directed to the sherife, whereby he was commanded, *quod si prædictus A. invenerit tibi 12. probos, et legales homines de comitatu tuo &c. qui eum manucipiant habere coram justitiariis nostris ad primam assisam, &c. Standun, &c. tunc ipsum A. &c. prædictis duodecim tradas in ballium.*

Hill. 32 E. 1.
ubi sup.

Lastly, that there was a meane by the common law, before inditement, or appeale, to protect the innocent against false accusation, and to deliver him out of prison.

Odium, signifieth hatred, and *atia* or *acia* in this writ signifieth

feth malice, because that malice is *acida*, that is, eager, sharpe and cruell.

And this branch, for further benefit, and in favour of the prisoner, doth enact, that he shall have it gratis, without fee, and without delay, or deniall, of which the Mirror saith thus, *le defence que se fait del breife de odio, et atia, que le roy ne son chancelor ne preignont pur le breife granter se doit extend a tous breifs remedials, et le dit breife ne, doit solement extender a felonies de homicide, mes a tous felonies, et ne solemt. in appeles, mes en inditement.* Regit. f. 133, 134. Mirror, c. 5. § 2.

But this writ was taken away by a later statute, viz. in 28 E. 3. because as some pretended, it became unnecessary, for that justices of assise, justices of oyer and terminer, and justices of gaole delivery came at the least into every county twice every yeare; but within 12 years after this statute, it was enacted, as often hath been said, that all statutes made against *Magna Charta* (as the said act of 28 E. 3. was) should be voyd, whereby the writs of *odio et atia, et de ponendo in balium* are revived, and so in like cases upon all the branches of *Magna Charta*. And therefore the justices of assise, justices of oyer and terminer, and of gaole delivery, have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, by due triall, without detaining him long in prison: nay, they have been so farre from allowance of his detaining in prison without due triall, that it was resolved in the case of the abbot of S. Albion by the whole court, that where the king had graunted to the abbot of S. Albion, to have a gaole, and to have a gaole delivery, and divers persons were committed to that gaole for felony, and because the abbot would not be at cost to make deliverance, he detained them in prison long time without making lawfull deliverance, that the abbot had for that cause forfeited his franchise, and that the same might bee seised into the kings hand.

For his committing to prison is onely to this end, that he may be forth coming, to be duly tried, according to the law and custome of the realme. The abbot of Crowland had a gaole, wherein divers men were imprisoned, and because he detained some that were acquitted of felony after their fees paid, the king seised the gaole for ever.

And it is provided by the statute of 5 H. 4. that none be imprisoned by any justice of peace, but in the common gaole, to the end they might have their triall at the next gaole delivery, or sessions of the peace. *Vide cap. 29.*

And some say, that this statute extendeth to all other judges, and justices for two reasons. 1. They say, that this act is but declaratory of the common law. 2. *Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est.*

Breve regis de bono et malo is so called of the words, *de bono et malo*, contained in the writ. This writ lay when A. B. was committed to prison for the death of a man, the king did write to the justices of gaole delivery; *quod si A. B. captus, et detentus in gaola prædicta pro morte C. D. de bono et malo super patriam inde ponere voluerit, et ea occasione (et non per aliquod speciale mandatum nostrum) detentus sit in eadem, tunc eandem gaolam de prædicto A. B. secundum legem, et consuetudinem Angliæ, deliberetis.* So as without question the writ *de bono et malo*, is not the writ *de odio et atia*, as some have imagined.

Note, in those dayes the justices of gaole delivery would not

E 2

proceed

[43]

28 E. 3. ca. 9.
Stamf. Pl. Cor.
77. F.N.B. 92.
42 E. 3. ca. 1.

See the Statute
of Gloc. ca. 9.

8 H. 4. 18.
20 E. 4. 6.
Bro. tit. Forfeiture.

20 E. 4. 6.

5 H. 4. cap. 10.
lib. 9. fol. 119.
Seignior Zanchars case.

See the Statute
of Gloc. cap. 9.

Hill. 32 E. 1.
Coram Rege
Eborū. Roger le
Wildes Case.
See the forme of
this Writ at
large in this record.

proceed in case of the death of á man, without the kings writ: for in the same record it appeareth, that *R. W. indictatus de morte W. E. non tulit breve regis de bono, et malo, ideo retornatur gaolæ, et sic de aliis.*

CAP. XXVII.

SI aliqui teneant de nobis per feodi firmam (1), vel per socagium (2), vel burgagium (3), et de alio teneant terram per servitium militare (4), nos non habebimus custodiam hæredis, nec terræ suæ, quæ est de feodo alterius, occasione illius feodi firmæ, vel socagii, vel burgagii. Nec habebimus * custodiam illius feodi firmæ, vel socagii, vel burgagii, nisi ipsa feodi firma nobis debeat servitium militare. Nos non habebimus custodiam hæred', vel alicujus terræ, quam tenet de aliquo alio per servitium militare, occasione alicujus parvæ serjantiæ, quam tenet de nobis per servitium, reddend' nobis cultellos, sagittas, vel hujusmodi.

* [44]

(Bro. Tenures, 69. Fitz. Gard. 145. 12 Car. 2. c. 24.)

See the Statute of Glouc. cap. 4. F.N.B. 210. 45 E. 3. 15.

Brit. fol. 164. b. Bract. li. 2. fo. 35. Fleta, lib. 1 ca. 10. Mirror, ca. 2. § 17.

See the first part of the Institutes. sect. 117.

* Rot. claus. 12 H. 3. m. 12. Litt. sect. 162.

Ib. sect. 103.

Glanv. li. 7. ca. 9.

(1) *Per feodi firmam.*] Fee farme properly taken is, when the lord upon the creation of the tenancy reserve to himselfe, and his heires, either the rent, for the which it was before letten to farme, or at least a fourth part of that farme rent.

But Britton saith, *Fee farmes sont terres tenus in fee, a rendre pur eux per ann. le veray value, ou plus, ou meins*, and is called a fee farme, because a farme rent is reserved upon a graunt in fee. And regularly, as it appeareth by this act, lands graunted in fee farme are holden in socage, unlesse an expresse tenure by knights service be reserved, as it appeareth hereafter in this chapter.

(2) *Vel per socagium.*] * *Tenere per firmam albam est tenere libere in socagio. Vide in libro nigro scaccarii, capite De officio clericorum de firma blanca.* It is commonly called blanch farme, *Lucubrat. Ockham, firma blanca, et vide ibi antiquum verbum [dealbari].*

(3) *Burgagium.*] See the *Custumier de Normandie*, cap. 32. and the commentaries upon the same.

(4) *Per servitium militare.*] See *le Custumier de Norman. cap. 33. De gard de orphelines*, fol. 49. and the comment upon the same.

This act, as well concerning tenures in fee farme, socage, and burgage, as by little serjanty, is declaratory of the common law, and constantly in use to this day, and needeth no further explanation.

C A P. XXVIII.

NULLUS balivus de cætero ponat aliquem ad legem manifestam, nec ad juramentum simplici loquela sua, sine testibus fidelibus ad hoc indutis.

NO bailiff from henceforth shall put any man to his open law, nor to an oath, upon his own bare saying, without faithful witnesses brought in for the same.

(Fitz. Ley, 78. Bro. Ley, 37.)

The Mirror treating of this chapter saith, *Le point que defend, que nul bayliffe met frank home a serement sans sute present, est interpretable en cest manner, que nul justice, nul minifter le roy, ne auter seneschall, ne bailif ne eit power a mitter frank home a serement faire, sans le commandement le roy, ne puit resevoir ascuns testimoignes, que testimoignent le monfrance estre veray.*

Mirror, cap. 5. §12. Fleta li. 2. cap. 56 W. 2. ca. 35. des hauts homes.

By this it appeareth, that under this word *balivus*, in this act is comprehended every justice, minister of the king, steward and bayliffe.

Fleta ubi supra. Vide Vet. Magna Charta, pt 2. in stat. Hibern. 68. b. See the first part of the Institutes, sect. 248.

Simplici loquela sua.] For as Bracton saith, *vox simplex nec probationem facit, nec præsumptionem inducit; item non per sectam, quæ, fieri * potest per domesticos, et familiares, secta enim probationem non facit, sed levem inducit præsumptionem, et vincitur per probationem in contrarium, et per defensionem per legem.*

Bract. l. 5. fo. 400. b.

* [45]

It appeareth by Glanvill, that the defendant ought to make his law, 12. manu. And so it appeareth by a judgement in the same yeare, and term, that this great charter was made, for there, in debt the defendant waged his law, *ideo consideratum est per curiam, quod defendens se duodecima manu venit cum lege.*

Glanv. li. 1. ca. 9.

Mich. 9. H. 3. tit. Ley 78.

Every wager of law doth countervail a jury, for the defendant shall make his law, *de duodecima manu, viz. an eleven, and himself.* And it should seeme, that this making of law was very auncient, for one writing of the auncient law of England saith, *hujus purgationis non omnis evanuit vetustate memoria, nam per hæc tempora de pecunia postulatus, debitum nonnunquam duodecima, quod aiunt, manu dissolvit.*

33 H. 6. 8.

How much, and for what cause the law respecteth the number of 12. see the first part of the Institutes.

See the first part of the Institutes, sect. 234.

The party himselfe, when he maketh his law shall be sworne *de fidelitate*, that is, directly or absolutely, and the others *de credulitate*, that is, that they beleeve that he saith true.

To make his law, is as much as to say, as to take his oath, &c. and it is so called, because the law giveth him that meane by his owne oath, to free himselfe.

And the reason, wherefore in an action of debt upon a simple contract, the defendant may wage his law, is, for that the defendant may satisfie the party in secret, or before witness, and all the witnesses may die, so the law doth allow him to wage his law for his discharge: and this, for ought I could ever reade, is peculiar to the law of England, and no mischiefe insueth hereupon

for the plaintiffe may take a bill or bond for his money, or if it be a simple contract, he may bring his action upon his case upon his agreement or promise, which every contract executory implieth, and then the defendant cannot wage his law.

C A P. XXIX. ✓

NULLUS liber (1) homo (2) capiatur, vel imprisonetur (3), aut disseisietur de libero tenemento suo, vel libertatibus (4), vel liberis consuetudinibus (5) suis, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium (6) parium suorum (7), vel per legem terræ (8). Nulli vendemus (9), nulli negabimus, aut differemus (10) iustitiam, vel rectum (11).

NO freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

(5 Rep. 64. 10 Rep. 74. 11 Rep. 99. Regist. 186. Mirror, 314. 1 Anderf. 158. 2 Bulstr. 328. 3 Bulstr. 47. Wood's Inst. 613, 614. 2 Ed. 3. c. 8. 5 Ed. 3. c. 9. 14 Ed. 3. stat. 2. c. 14. 25 Ed. 3. ft. 5. c. 4. 28 Ed. 3. c. 3. 42 Ed. 3. c. 3. 11 R. 2. c. 10. 37 Ed. 3. c. 18. 4 H. 7. c. 12. 16 Car. 1. c. 10. 1 Roll. 208, 209, 225. 12 Rep. 50, 63, 93.)

See the Statute anno 34 E. 1. de tallagio, &c. an excellent Law. 20 H. 6. cap. 9. Stamf. Pl. Cor. 152. b. 25 E. 3. 43. b. li. 6. fol. 52. The Countesse of Rutlands case. 11 H. 4. 15. 3 H. 6. 58. 48 E. 3. 30. 35 H. 6. 46.

* [46]

(1) *Nullus liber, &c.*] This extends to villeins, saving against their lord, for they are free against all men, saving against their lord. See the first part of the Institutes, sect. 189.

(2) *Nullus liber homo.*] Albeit *homo* doth extend to both sexes, men and women, yet by act of parliament it is enacted, and declared, that this chapter should extend to duchesses, countesses, and baronesses, but marchionesses, and viscountesses are omitted, but notwithstanding they are also comprehended within this chapter.

* Upon this chapter, as out of a roote, many fruitfull branches of the law of England have sprung.

And therefore first the genuine sense hereof is to be seene, and after how the same hath been declared, and interpreted. For the first, for more perspicuity, it is necessary to divide this chapter into severall branches, according to the true construction and reference of the words.

This chapter containeth nine severall branches.

See W. 1. ca. 15.

1. That no man be taken or imprisoned, but *per legem terræ*, that is, by the common law, statute law, or custome of England; for these words, *per legem terræ*, being towards the end of this chapter, doe referre to all the precedent matters in this chapter, and this hath the first place, because the liberty of a mans person is more precious to him, then all the rest that follow, and therefore it is great reason, that he should by law be relieved therein, if he be wronged, as hereafter shall be shewed.

2. No man shall be disseised, that is, put out of seison, or dispossessed of his freehold (that is) lands, or livelihood, or of his liberties,

liberties, or free-customes, that is, of such franchises, and free-domes, and free-customes, as belong to him by his free birth-right, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course, and processe of law.

3. No man shall be out-lawed, made an *exlex*, put out of the law, that is, deprived of the benefit of the law, unlesse he be out-lawed according to the law of the land.

4. No man shall be exiled, or banished out of his country, that is, *nemo perdet patriam*, no man shall lose his country, unlesse he be exiled according to the law of the land.

5. No man shall be in any sort destroyed (*destruere*, i. *quod prius frustum, et factum fuit, penitus evertere et diruere*) unlesse it be by the verdict of his equals, or according to the law of the land.

6. No man shall be condemned at the kings suite, either before the king in his bench, where the pleas are *coram rege* (and so are the words, *nec super eum ibimus*, to be understood) nor before any other commissioner, or judge whatsoever, and so are the words, *nec super eum mittimus*, to be understood, but by the judgement of his peers, that is, equals, or according to the law of the land.

7. We shall sell to no man justice or right.

8. We shall deny to no man justice or right.

9. We shall defer to no man justice or right.

The genuine sense being distinctly understood, we shall proceed in order to unfold how the same have been declared, and interpreted. 1. By authority of parliament. 2. By our books. 3. By precedent.

(3) *Nullus liber homo capiatur, aut imprisonetur.*] Attached and arrested are comprehended herein.

1. No man shall be taken (that is) restrained of liberty, by petition, or suggestion to the king, or to his counsell*, unlesse it be by indictment, or presentment of good, and lawfull men, where such deeds be done. This branch, and divers other parts of this act have been notably explained by divers* acts of parliament, &c. quoted in the margin.

2. No man shall be disseised, &c.

^b Hereby is intended, that lands, tenements, goods, and chattells shall not be seised into the kings hands, contrary to this great charter, and the law of the land; nor any man shall be disseised of his lands, or tenements, or dispossessed of his goods, or chattells, contrary to the law of the land.

^c A custome was alledged in the town of C. that if the tenant cease by two yeares, that the lord should enter into the freehold of the tenant, and hold the same untill he were satisfied of the arrearages, and it was adjudged a custome* against the law of the land, to enter into a mans freehold in that case without action or answer.

King H. 6. graunted to the corporation of diers within London, power to search, &c. and if they found any cloth died with logwood, that the cloth should be forfeit: and it was adjudged, that this charter concerning the forfeiture, was against the law of the land, and this statute: for no forfeiture can grow by letters patents,

^a 5 E. 3. cap. 9.

25 E. 3. ca. 4.

37 E. 3. ca. 8.

38 E. 3. ca. 9.

42 E. 3. ca. 3.

17 R. 2. cap. 6.

Rot. Parl. 43

E. 3. Sir Jo. a

Lees case. nu.

21, 22, 23, &c.

lib. 10. fol. 74.

in case del Mar-

shalsea.

* See W. 2. ca.

15.

^b See 43 Aff. p.

21. where this

branch of Magna

Charta, and

other statutes

are cited, *nota*

bene, the usurpa-

tion to an ad-

vowson is with-

in this act.

5 E. 3. cap. 9.

25 E. 3. cap. 4.

^c 43 E. 3. 32.

Lib. 8. Tr. 41.

El. fol. 125.

Case de Londres.

• [47]

2 & 3 Ph. et
Mar. Diet. 114,
115.

No man ought to be put from his livelihood without answer.

3. No man outlawed, that is, barred to have the benefit of the law, Vide for the word, the first part of the Institutes.

Note to this word *utlagetur*, these words, *nisi per legem terræ*, do refer.

(4) *De libertatibus*.] This word, *libertates*, liberties, hath three significations:

1. First, as it hath been said, it signifieth the laws of the realme, in which respect this charter is called, *charta libertatum*.

2. It signifieth the freedomes, that the subjects of England have; for example, the company of the merchant tailors of England, having power by their charter to make ordinances, made an ordinance, that every brother of the same society should put the one half of his clothes to be dressed by some clothworker free of the same company, upon pain to forfeit x. s. &c. and it was adjudged that this ordinance was against law, because it was against the liberty of the subject, for every subject hath freedom to put his clothes to be dressed by whom he will, *et sic de similibus*: and so it is, if such or the like graunt had been made by his letters patents.

3. Liberties signifieth the franchises, and privileges, which the subjects have of the gift of the king, as the goods, and chattels of felons, outlaws, and the like, or which the subject claim by prescription, as wreck, waife, straie, and the like.

So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedom of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.

Generally all monopolies are against this great charter, because they are against the liberty and freedom of the subject, and against the law of the land.

(5) *Liberis consuetudinibus*.] Of customes of the realme, some be generall, and some particular. Of these read in the first part of the Institutes. And *liberis* is added, for that the customes of England bring a freedom with them.

4. No man exiled.

By the law of the land no man can be exiled, or banished out of his native countrey, but either by authority of parliament, or in case of abjuration for felony by the common law: and so when our books, or any record speak of exile, or banishment, other then in case of abjuration, it is to be intended to be done by authority of parliament: * as Belknap and other judges, &c. banished into Ireland.

This is a beneficially law, and is construed benignly, and therefore the king cannot send any subject of England against his will to serve him out of this realme, for that should be an exile, and he should *perdere patriam*: no, he cannot be sent against his will into Ireland, to serve the king as his deputy there, because it is out of the realme of England: for if the king might send him out of this realme to any place, then under pretence of service, as ambassador, or the like, he might send him into the furthest part of the world, which being an exile, is prohibited by this act. And albeit it was accorded in the upper-house of parliament, anno 6 E. 3. nu. 6. that such learned men in the law, as should bee sent, as justices, or otherwise, to serve in Ireland, should have no excuse,

yet

Tr. 41 Eliz.
Coram Rege.
Rot. 92. in trns.
Int. Davenant &
Hurdes.

Tr. 44 Eliz.
Coram Rege, lib.
11. fol. 84. 85,
&c. Edw. Dar-
cies case.

Rot. Parliam.
19 E. 1. Rot. 12.
Boilands case.
31 E. 1. Cui in
vita 31. 18 E. 3.
54. Matravers
case. Parliam.
15 E. 2. Exilium
Hugonis.
* Rot. Parliam.
13 R. 2. nu. 28.
Stam. Pl. Cor.
116, 117. 35 E.
1. cap. 1.

yet that being no act of parliament, it did not binde the subject. And this notably appeareth by a record, in 44 E. 3. Sir Richard Pembrughs case, who was warden of the cinque ports, and had divers offices, annuities, and lands graunted to him for life, or in fee by the king under the great seale, *pro servitio impenso, et impendendo*, the king commanded Sir Richard to serve him in Ireland, as his deputy there, which he absolutely refused, whereupon the king by advice of his counsell, seised all things graunted to him, *pro servitio impendendo* (in respect of that clause) but he was not upon that resolution committed to prison, as by that record it appeareth; and the reason was because his refusall was lawfull, and if the refusall was lawfull to serve in Ireland parcell of the kings dominions, a *fortiori*, a refusall is lawfull to serve in any foreign country. And it seemeth to me, that the said seisure was unlawfull, for *pro servitio impenso et impendendo*, must be intended lawfull service within the realme.

5. No man destroyed, &c.

That is, fore-judged of life, or limbe, disherited, or put to torture, or death.

The Mirror writing of the auncient laws of England, saith, *soloient les roys faire droit a tous, per eux, ou per leur chiefe justices, et ore les faits les royes per leur justices commissaries errants assignes a tous pleas: en aid de tiels eires sont tornes de viscounts necessaries, et vieus de frankpl. et quant que bones gents a tiels inquests inditerent de peche mortel, soloient les royes destruire sans respons, &c. Accord est, que nul appelee, ne enditee soit destroy sans respons.*

Thomas earle of Lancaster was destroyed, that is, adjudged to die, as a traitor, and put to death in 14 E. 2. and a record thereof made: and Henry earle of Lancaster his brother, and heire, was restored for two principall errors in the proceeding against the said Thomas Earle, 1. *Quod non fuit araniatus, et ad responsonem positus tempore pacis, eo quod cancellaria, et alice curie regis fuer' aperte, in quibus lex fiebat unicuique, prout fieri consuevit.* 2. *Quod contra cartam de libertatibus, cum dictus Thomas fuit unus parium, et magnatum regni, in qua continetur* (and recireth this chapter of Magna Charta, and specially, *quod dominus rex non super eum ibit, nec mittet, nisi per legale iudicium parium suorum tamen per recordum prædictum, tempore pacis absq; aranamento, seu responfione, seu legali iudicio parium suorum, contra legem, & contra tenorem Magnæ Chartæ*) he was put to death: more examples of this kinde might be shewed.

Every oppression against law, by colour of any usurped authority, is a kinde of destruction; for, *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud*: and it is the worst oppression, that is done by colour of justice.

It is to be noted, that to this verb *destruatur*, are added *aliquo modo*, and to no other verb in this chapter, and therefore all things, by any manner of meanes tending to destruction, are prohibited: as if a man be accused, or indicted of treason, or felony, his lands, or goods cannot be graunted to any, no not so much as by promise, nor any of his lands, or goods seised into the kings hands, before attainder: for when a subject obtaineth a promise of the forfeiture, many times undue meanes and more violent prosecution is used for private lucre, tending to destruction, then the quiet and iust proceeding of law would permit, and the party ought to live of his own untill attainder.

Rot. clauf. anno 44 E. 3. Sir Richard Pembrughs Case.

5 E. 3. cap. 9.
28 E. 3. cap. 3.
Fortescue cap. 22.
Mirror, cap. 2.
§ 3.

Plaf. 39 E. 3.
Coram Rege,
John of Gaunts
case. Rot. Parl.
4 E. 3. nu. 13.
Countee de
Arund. case.
Rot. Parl. 42
E. 3. nu. 23.
Sir Jo. of Lees
case.

Lib. 10. fol. 74.
In the case of the
Marshallsea.

Regula.

Rot. Parl. 15
E. 3. nu. 6. &c.

11 E. 3. breve.
173. 6 R. 2.
proces. Pl. ulti-
mo. 20 E. 4. 6.
20 Eliz. Dier.
360. Lib. 9. fol.
117. Seignior
Zanchars case.

[49]

1 H. 4. 1.
13 H. 8. 1.
10 E. 4. 6.

(6) *Per judicium parium suorum.*] By judgement of his peers. Onely a lord of parliament of England shall be tried by his peers being lords of parliament: and neither noblemen of any other country, nor others that are called lords, and are no lords of parliament, are accounted *pares*, peers within this statute. Who shall be said *pares*, peeres, or equalls, see before cap. 14. § *per pares*.

Here note, as is before said, that this is to be understood of the kings sute for the words be, *nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum*. Therefore, for example, if a noble man be indicted for murder, he shall be tried by his peeres, but if an appeale be brought against him, which is the suite of the party, there he shall not be tried by his peeres, but by an ordinary jury of twelve men: and that for two reasons. First, for that the appeale cannot be brought before the lord high steward of England, who is the only judge of noble men, in case of treason, or felony. Secondly, this statute extendeth only to the kings suite.

And it extendeth to the kings suite in case of treason, or felony, or of misprision of treason, or felony, or being accessary to felony before, or after, and not to any other inferior offence. Also it extendeth to the triall it selfe, whereby he is to be convicted: but a nobleman is to be indicted of treason, or felony, or of misprision, or being accessary to, in case of felony, by an inquest under the degree of nobility: the number of the noble men that are to be triers are, 12. or more.

And a peer of the realme may be indicted of treason, or felony, before commissioners of oier & terminer, or in the kings bench, if the treason or felony be committed in the county where the kings bench sit: he also may be indicted of murder, or manslaughter, before the coroner, &c. But if he be indicted in the kings bench, or the indictment removed thither, the noble man may plead his pardon there before the judges of the kings bench, and they have power to allow it, but he cannot confesse the indictment, or plead not guilty before the judges of the kings bench, but before the lord steward; and the reason of this diversity, that the triall or judgement must be before or by the lord steward, but the allowance of the pardon may be by the kings bench, is because that is not within this statute.

If a noble man be indicted, and cannot be found, proces of outlawrie shall be awarded against him *per legem terræ*, and he shall be outlawed *per judicium coronatorum*, but he shall be tried *per judicium parium suorum*, when he appears and pleads to issue.

(7) *Per legale judicium.*] By this word *legale*, amongst others, three things are implied. 1. That this manner of triall was by law, before this statute. 2. That their verdict must be legally given, wherein principally it is to be observed. 1. That the lords ought to heare no evidence, but in the presence, and hearing of the prisoner. 2. After the lords be gone together to consider of the evidence, they cannot send to the high steward to aske the judges any question of law, but in the hearing of the prisoner, that he may heare, whether the case be rightly put, for *de facto jus oritur*; neither can the lords, when they are gone together, send for the judges to know any opinion in law, but the high steward ought to demand it in court in the hearing of the prisoner. 3. When all the evidence is given by the kings learned counsell, the high steward cannot collect

19 H. 7. Edm.
de la Pole Earle
of Suff. case.
Hil. 13. Jac. b.
the Lord Norrice
case coram rege.

Stamf. pl. cor.
130.

Pasch. 26. H. 8.
in the case of
the L. Ducres of
the north, re-
solved by all the
judges of Eng-
land as justice
Spelman reports.
See the 3 part of
the Institutes,
cap. Treason.

collect the evidence against the prisoner, or in any sort conferre with the lords touching their evidence, in the absence of the prisoner, but he ought to be called to it; and all this is implied in this word, *legale*. And therefore it shall be necessary for all such prisoners, after evidence given against him, and before he depart from the barre, to require justice of the lord steward, and of the other lords, that no question be demanded by the lords, or speech or conference had by any with the lords, but in open court in his presence, and hearing, or else he shall not take any advantage thereof after verdict, and judgement given: but the handling thereof at large and of other things concerning this matter, belongs to another treatise, as before I have shewed, only this may suffice for the exposition of this statute. See the 3 part of the Institutes, cap. Treason.

And it is here called *judicium parium*, and not *vereditum*, because the noble men returned, and charged, are not sworne, but give their judgement upon their honour and ligeance to the king, for so are all the entries of record, separately beginning at the *puisne* lord, and so ascending upward.

And though of ancient time the lords, and peeres of the realme used in parliament to give judgement, in case of treason and felony, against those, that were no lords of parliament, yet at the suite of the lords it was enacted, that albeit the lords and peeres of the realme, as judges of the parliament, in the presence of the king, had taken upon them to give judgement, in case of treason and felony, of such as were no peeres of the realme, that hereafter no peeres shall be driven to give judgement on any others, then on their peeres according to the law.

This triall by peeres was very auncient, for I reade, that William the Conqueror, in the beginning of his raigne, created William Fitzosborne (who was earle of Bretevil in Normandy) earle of Hereford in England, his sonne Roger succeeded him, and was earle of Hereford, who under colour of his sisters marriage at Exninge, neare Newmarket in Cambridge shire, whereat many of the nobility, and others were assembled, conspired with them to receive the Danes into England, and to depose William the Conqueror (who then was in Normandy) from his kingdome of England: and to bring the same to effect, he with others rose. This treason was revealed by one of the conspirators, viz. Walter earle of Huntingdon an English man, sonne of that great Syward earle of Northumberland: for which treason this Roger earle of Hereford was apprehended, by Urfe Tiptoft then sheriffe of Worcester shire, and after was tried by his peeres, and found guilty of the treason *per judicium parium suorum*, but he lived in prison all the daies of his life. You have heard in the exposition of the 14 chapter, who are, to be said peeres, somewhat is necessary to be added thereunto. It is provided by the statute of 20 H. 6. that dutchesse, countesses, and baronesses, shall be tried by such peeres as a noble man, being a peere of the realme ought to be; which act was made in declaration, and affirmance of the common law: for marquesses, and viscountesses not named in the act shall be also tried by their peeres, and the queene being the kings consort, or dowager, shall also be tried, in case of treason, *per pares*, as queene Anne, the wife of king Henry the eight was *termino Pasch. anno 28 H. 8.* in the towre of London before the duke of Norff. then high steward.

[50]
Rot. Parliam:
4 E. 3. nu. 6.

Anno 8 Will.
conq.

Anno 8. W. 1.

20 H. 6. cap. 9.

Pasch. 28 H. 8.
Spelmans report.

If

If a woman that is noble by birth, doth marry under the degree of nobility, yet shee shall be tried by her peeres, but if she be noble by marriage, and marry under the degree of nobility shee loseth her dignity, for as by marriage it was gained, so by marriage it is lost, and shee shall not be tried by her peers. If a dutchesse by marriage doe marry a baron, shee loseth not her dignity, for all degrees of nobility, as hath been said, are *paræ*. If a queene dowager marry any of the nobility, or under that degree, yet loofeth shee not her dignity, as Katherine queene dowager of England, married Owen ap Meredith ap Theodore esquire, and yet shee by the name of Katherine queene of England, maintained an action of detinew, against the bishop of Carlile,

Rot. Parliam.

26 E. 1. Rot. 1.

And the queene of Navarra marrying with Edmund the brother of E. 1. sued for her dower by the name of queene of Navarra and recovered.

(8) *Nisi per legem terræ.*] But by the law of the land. For the true sence and exposition of these words, see the statute of 37 E. 3. cap. 8. where the words, by the law of the land, are rendred without due proces of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law.

25 E. 3. cap. 4.

Without being brought in to answer but by due proces of the common law.

28 E. 3. cap. 3.

37 E. 3. cap. 8.

42 E. 3. cap. 3.

No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land.

Wherein it is to be observed, that this chapter is but declaratory of the old law of England. Rot. Parliament. 43 E. 3. nu. 22, 23. the case of Sir John a Lee, the steward of the kings' house.

[51]

Per legem Angliæ.] i. *Per legem Angliæ*, and hereupon all commiffions are grounded, wherein is this clause, *facturi quod ad justitiam pertinet secundum legem, et consuetudinem Angliæ, &c.* And it is not said, *legem et consuetudinem regis Angliæ*, lest it might be thought to bind the king only, nor *populi Angliæ*, lest it might be thought to bind them only, but that the law might extend to all, it is said *per legem terræ*, i. *Angliæ*.

19 H. 6. 7.

And aptly it is said in this act, *per legem terræ*, that is, by the law of England: for into those places, where the law of England runneth not, other lawes are allowed in many cases, and not prohibited by this act. For example: if any injury, robbery, felony, or other offence be done upon the high sea, *lex terræ* extendeth not to it, therefore the admirall hath consufance thereof, and may proceed, according to the marine law, by imprisonment of the body, and other proceedings, as have been allowed by the lawes of the realme.

13 H. 4. 5.

And so if two English men doe goe into a foreine kingdome, and fight there, and the one murder the other, *lex terræ* extendeth not hereunto, but this offence shall be heard, and determined before the constable, and marshall, and such proceedings shall be there, by attaching of the body, and otherwise, as the law, and custome of that court have been allowed by the lawes of the realme

11 H. 7. cap. 3.

Against this ancient, and fundamentall law, and in the face thereof, I finde an act of parliament made, that as well justices of assise, as justices

justices of peace (without any finding or presentment by the verdict oftwenelve men) upon a bare information for the king before them made, should have full power, and authority by their discretions to heare, and determine all offences, and contempts committed, or done by any person, or persons against the forme, ordinance, and effect of any statute made, and not repealed, &c. By colour of which act, shaking this fundamentall-law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson knight, and Edm. Dudley being justices of peace, throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made masters of the kings forfeitures.

But at the parliament, holden in the first yeare of H. 8. this act of 11 H. 7. is recited, and made voide, and repealed, and the reason thereof is yeelded, for that by force of the said act, it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the kings subjects to their great dammage, and wrongfull vexation: and the ill successe hereof, and the fearefull ends of these two oppressors, should deterre others from committing the like, and should admonish parliaments, that in stead of this ordinary, and pretious triall *per legem terræ*, they bring not in absolute, and partiall trialls by discretion.

1 H. 8. cap. 6.

If one be suspected for any crime, be it treason, felony, &c. And the party is to be examined upon certaine interrogatories, he may heare the interrogatories, and take a reasonable time to answer the same with deliberation (as there the time of deliberation was tenne houres) and the examinee, if he will, may put his answer in writing, and keepe a copie thereof: and so it was resolved in parliament by the lords spirituall and temporall, in the case of justice Richill. See the record at large.

Rot. pl. 1 H. 4.
memb. 2. nu. 1.

And the Lord Carew being examined, for being privy to the plot, for the escape of Sir Walter Rawleigh attainted of treason, desired to have a copy of his examination, and had it, as *per legem terræ* he ought.

Anno 16. Jacobi
regis.

Now here it is to be knowne, in what cases a man by the law of the land, may be taken, arrested, attached, or imprisoned in case of treason or felony, before presentment, indictment, &c. Wherein it is to be understood, that proces of law is two fold, viz. By the kings writ, or by due proceeding, and warrant, either in deed, or in law without writ.

As first, where there is any witnesse against the offendor, he may be taken and arrested by lawfull warrant, and committed to prison.

* When treason and felony is committed, and the common fame and voice is, that A. is guilty, it is lawfull for any man, that suspects him, to apprehend him.

^a This fame Bracton describeth well, *fama quæ suspicionem inducit, oriri debet apud bonos, et graves, non quidem malevolos, et maledicos, sed providas et fide dignas personas, non semel, sed sæpius, quia clamor minuit, et defamatio manifestat.*

^b So it is of hue and cry, and that is by the statute of Winchester, which is but an affirmance of the common law: likewise if A.

* [52]

7 E. 4. 20.
8 E. 4. 3.
9 E. 4. 27.
11 E. 4. 2.
2 H. 7. 15. b. 4.
4 H. 7. 18.
5 H. 7. 5. a.
26 H. 8. 9.
27 H. 8. 23.
^a Bracton. fo.
143.
^b 29 E. 3. 9.
30 E. 3. 39.
26 E. 3. 71.
W. 1. cap. 9.

be suspected, and he fleeth, or hideth himselfe, it is a good cause to arrest him.

c 11 H. 4. 4. b.
20 E. 4. 6. b.
14 H. 8. 16.
27 H. 8. 23.

c If treason or felony be done, and one hath just cause of suspicion, this is a good cause, and warrant in law, for him to arrest any man, but he must shew in certainty the cause of his suspicion: and whether the suspicion be just, or lawfull, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a *habeas corpus*, &c.

29 E. 3. 39.

A felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be by a warrant in law, attached and imprisoned by the law of the land.

4 H. 7. 2.

A watchman may arrest a night walker by a warrant in law.

5 H. 7. 5.

If a man woundeth another dangerously, any man may arrest him by a warrant in law, until it may be known, whether the party wounded shall die thereof, or no.

10 H. 7. 20.

26 E. 3. 71. a.

If a man keep the company of a notorious thiefe, whereby he is suspected, &c. it is a good cause, and a warrant in law to arrest him.

38 H. 8. faux imprisonment, Br. 6.

If an affray be made to the breach of the kings peace, any man may by a warrant in law restrain any of the offenders, to the end the kings peace may be kept, but after the affray ended, they cannot be arrested without an expresse warrant.

See now the statutes of 1 & 2 Phil. & Mar. cap. 13. & 2 & 3 Phil. & Mar. cap. 10.

Now seeing that no man can be taken, arrested, attached, or imprisoned but by due processe of law, and according to the law of the land, these conclusions hereupon doe follow.

First, that a commitment by lawfull warrant, either in deed or in law, is accounted in law due processe or proceeding of law, and by the law of the land, as well as by processe by force of the kings writ.

2. That he or they, which doe commit them, have lawfull authority.

3. That his warrant, or *mittimus* be lawfull, and that must be in writing under his hand and seale.

4. The cause must be contained in the warrant, as for treason, felony, &c. or for suspicion of treason or felony, &c. otherwise if the *mittimus* contain no cause at all, if the prisoner escape, it is no offence at all, whereas if the *mittimus* contained the cause, the escape were treason, or felony, though he were not guilty of the offence; and therefore for the kings benefit, and that the prisoner may be the more safely kept, the *mittimus* ought to contain the cause.

13 H. 7. Kelway 34. b.

See more before hereof in the exposition upon the statute of 1 E. 2. de frangentibus prisonariis.

Out of the kings bench, though there be not any priviledge, &c.

5. The warrant or *mittimus* containing a lawfull cause, ought to have a lawfull conclusion, viz. and him safely to keep, untill he be delivered by law, &c. and not untill the party committing doth further order. And this doth evidently appeare by the writs of *habeas corpus*, both in the kings bench, and common pleas, eschequer and chancery.

Rex vicecom. London. salutem. Præcipimus vobis, quod corpus A. B. in custodia vestra detent. ut dicitur, una cum causa detentionis suæ, quocumq; nomine præd. A. B. consensatur in eisdem, habeatis coram nobis apud Westm. die Jovis prox' post octabis S. Martini, ad subjiaciend. et recipiend. ea, quæ curia nostra de eo adiunc, et ibidem ordinari.
contigerit

*contigerit in hac parte, et hoc nullatenus omittatis, periculo incurren-
tente, et habeatis ibi hoc breve, teste Edw. Coke 20 Nov. anno regni
nostri 10.*

This is the usuall forme of the writ of habeas corpus in the kings bench, *vide Mich. 5 E. 4. Rot. 143. coram Rege, Kefars case,* under the teste of Sir John Markham.

[53]

*Rex vicecom. London. salutem. Præcipimus vobis, quod habeatis
coram justiciariis nostris, apud Westm. die Jovis prox' post quinque
septiman. Pasche, corpus A. B. quocunque nomine censeatur, in pri-
sona vestra, sub custodia vestra detent. ut dicitur, una cum die, et causa
captionis et detentionis ejusdem, ut iidem justiciar. nostri, visa causa
illa, ulterius fieri fac', quod de jure, et secundum legem, et consue-
tudinem regni nostri Angliæ foret faciend. et habeatis ibi hoc breve,
teste, &c.*

In the common pleas, for any man priviledged in that court, and the like in the eschequer.

The like writ is to be graunted out of the chancery, either in the time of the terme (as in the kings bench) or in the vacation; for the court of chancery is *officina justitiæ*, and is ever open, and never adjourned, so as the subject being wrongfully imprisoned, may have justice for the liberty of his person as well in the vacation time, as in the terme.

Out of the chancery generally, though there be not any privilege, &c.

4 E. 4.

By these writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these words, *ad subjiciend. et recipiend. &c.* prove that cause must be shewed: for otherwise how can the court take order therein according to law?

And this doth agree with that which is said in the holy history, *Sine ratione mihi videtur, mittere vinclum in carcerem, et causas ejus non significare.* But since we wrote these things, and passed over to many other acts of parliament; see now the petition of right, *anno tertio Caroli regis*, resolved in full parliament by the king, the lords spirituall, and temporall, and the commons, which hath made an end of this question, if any were.

Act. Apost. cz.
25. ver. ult.

Inprisonment doth not onely extend to false imprisonment, and unjust, but for detaining of the prisoner longer then he ought, where he was at the first lawfully imprisoned.

If the kings writ come to the sheriffe, to deliver the prisoner, if he detain him, this detaining is an imprisonment against the law of the land: if a man be in prison, a warrant cannot be made to the gaoler to deliver the prisoner to the custody of any person unknown to the gaoler, for two causes; first, for that thereby the kings writ of habeas corpus, or delivery, might be prevented. 2. The mittimus ought to bee, as hath beene said, till hee bee delivered by law.

Hil. 32 E. 1.
coram rege.
Rot. 71. & 79.
So it was holden
Pasch. 34 Eliz.
by all the jus-
tices.
8 H. 4. 18.
20 E. 4. 6.

If the sheriffe, or gaoler detain a prisoner in the gaole after his acquittall, unless it be for his fees, this is false imprisonment.

In many cases a man may be by the law of the land taken, and imprisoned, by force of the kings writ upon a suggestion made.

Against those that attempt to subvert, and enervate the kings lawes, there lieth a writ to the sheriffe in nature of a commission, *ad capiendum impugnatores juris regis, et ad ducendum eos ad gaolam de Newgate;* which you may reade in the Register at large. *Ubi supra.* And this is *lex terræ*, by proceffe of law, to take a man without answer, or summons in this case: and the reason is, *merito beneficium legis amittit, qui legem ipsam subvertere intendit.*

Regist. 64. Rot.
Pat. 21 E. 3.
pt. 1. impugna-
tores juris re-
gis.

If a souldier after wages received, or prest money taken, doth
absent

Regist. 24. &
191.

absent himself, or depart from the kings service; upon the certificate thereof of the captain into the chancery, there lieth a writ to the kings serjeants at armes, if the party be vagrant, and hideth himselfe, *ad capiendum conduēdos proficiscend. in obsequium nostrum, &c. qui ad dictum obsequium nostrum venire non curaverint.* And this is *lex terræ*, by proceſſe of law, *pro defensione regis, et regni*, or for the same cause, a writ may be directed to the sheriffe, *de arreſtando ipsum, qui pecuniam recepit ad proficiscendum in obsequium regis, et non est profectus.*

Regist. fol. 267.
F. N. B. 233,
234.
20 E. 2. Cor.
233. 6 E. 3. 17.
22 E. 3. 2.

[54]

If a man had entered into religion, and was professed, and after he departed from his house, and became vagrant in the country against the rules of his religion, upon the certificate of the abbot, or prior thereof into the chancery, a writ should be directed to the sheriffe, *de apostata capiēdo*, whereby he was commanded in these words; *præcipimus tibi quod præſatum, &c. sine dilatione arreſtes, et præſat. abbat. &c. liberes secundum regulam ordinis sui caſtigand'*; and this was *lex terræ*, by proceſſe of law, *in honorem religionis.*

Regist. 59. 60.
F. N. B. 54.
15 R. 2. ca. 2.

If any lay men with force and strong hand, doe enter upon, or keep the possession either of the church, or of any of the houses, or glebe, &c. belonging thereunto, the incumbent upon certificate thereof of the bishop, or without certificate upon his own surmise may have a writ to the sheriffe, *de vi laica amovenda*, by which the sheriffe is commanded in these words; *præcipimus tibi quod omnem vim laicam seu armatam, quæ se tenet in dicta ecclesia, seu domibus eidem annexis, ad pacem nostram in com. tuo perturband. sine dilatione amoveas, et si quos in hac parte resistentes inveneris, eos per corpora sua attachias, et in prisona nostra salvo custodias, &c.* and this is *lex terræ*, by proceſſe of law, *pro pace ecclesiæ.*

Vide Regist.
284. 289. 290.
for the arreſſing
of purveyors,
which make
purveyance of
the men of the
church.

Regist. 89.
F. N. B. 85.
31 H. 8. Dier
43. 1 Mar. 92.
1 Eliz. 165.

Also a writ of *ne exeas regnum* may be awarded to the sheriffe, or justices of peace, or to both, that a man of the church shall not depart the realme; the effect whereof is; *quia datum est nobis intelligere, quod A. B. clericus versus partes exteras, ad quamplurima nobis, et quamplurima de populo nostro præjudicialia, et damnoſa, ibidem preſequend. transire proponit, &c. tibi præcipimus, quod prædict' A. B. coram te corporaliter venire facias, et ipsum ad ſufficientes manucaptores, invenierend. &c. Et si hoc coram te facere recuſaverit, tunc ipsum A. B. proximæ gaolæ committas salvo custodiend. quousque hoc gratis facere voluerit.* And there is another writ in the Register directed to the party either of the clergy or laity. And this is *lex terræ*, by proceſſe of law, *pro bono publico regis et regni*; whereof you may read more at large in the third part of the Institutes, cap. Fugitives.

Regist. 267.
F. N. B. 234.
Bract. li. 5. fo.
421. Brit. fo.
39. 88. Fleta,
li. 6. ca. 39.
Hil. 7 H. 5.
coram rege. Rot.
71 Rot. clauf.
22 E. 3. in dorf.
20. pic. m. 14.

Upon a surmise that a man is a leper, one that hath *morbum elephantiacum*, so called, because he hath a skin like to an elephant, there may be a writ directed to the sheriffe, *quia accepimus quod I de N. leproſus exiſtit, et inter homines comitatus tui communiter converſatur, &c. ad grave damnum homin' præd. et propter contagionem morbi præd. periculum manifestum, &c. tibi præcipimus quod. assumptis tecum aliquibus discretis et legalibus hominibus de comitat. præd. non suspectis, &c. ad ipsum I. accedas, &c. et examines, &c. et si ipsum leproſum inveneris, ut prædict' est, tunc ipsum honestiori modo, quo poteris a communione hominum prædict' amoveri, et se ad locum ſolitarium ad habitand' ibidem, prout moris est, transferre facias indilate, &c.* And this is *lex terræ*, by proceſſe of law, for ſaving of the people from contagion and infection.

Lib. 10. fo. 74.
in the caſe of the
Marſhalſea.

But if any man by colour of any authority, where he hath not any

any in that particular case; arrest, or imprison any man, or cause him to be arrested, or imprisoned, this is against this act, and it is most hatefull, when it is done by countenance of justice.

Rot. Parl.
42 E. 3. nu. 23.
Sir John a Lees
case.

King Edw. 6. did incorporate the town of S. Albons, and granted to them to make ordinances, &c. they made an ordinance upon paine of imprisonment, and it was adjudged to be against this statute of *Magna Charta*; so it is, if such an ordinance had been contained in the patent it selfe.

Lib. 5. fol. 64.
Clarks case.

All commissions that are consonant to this act, are, as hath been said, *secundum legem, et consuetudinem Angliæ*.

42 Aff. pl. 5.
Rot. Parliam.
17 R. 2. nu. 37.

A commission was made under the great seale to take I. N. (a notorious felon) and to seise his lands, and goods: this was resolved to be against the law of the land, unlesse he had been indicted, or appealed by the party, or by other due processe of law.

It is enacted, if any man be arrested, or imprisoned against the forme of this great charter, that he bee brought to his answer, and have right.

Rot. Parliam.
2 H. 4. nu. 60.

No man to be arrested, or imprisoned contrary to the forme of the great charter.

See more of the severall lawes allowed within this land, in the first part of the Institutes, sect. 3.

The philosophicall poet doth notably describe, the damnable and damned proceedings of the judge of hell,

[55]

*Gnosius hic Radamanthus habet durissima regna,
Castigatque, auditque dolos, subigitque fateri.*

Virgil.

And in another place,

----- *leges fixit precio atque refixit.*

First he punisheth, and then he heareth: and lastly, compelleth to confesse and make and marre lawes at his pleasure; like as the centurion in the holy history, did to S. Paul: For the text saith, *Centurio apprehendi Paulum jussit, et se catenis ligari et tunc interrogabat, quis fuisset, et quid fecisset*: but good judges and justices abhorre these courses.

Act. Apost. c.
22. v. 24. 274

Now it may be demanded, if a man be taken, or committed to prison *contra legem terræ*, against the law of the land, what remedy hath the party grieved? To this it is answered: first, that every act of parliament made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved: as in many of the chapters of this great charter appeareth; and therefore he may have an action grounded upon this great charter. As taking one example for many, and that in a powerfull, and a late time. Pasch. 2 H. 8. *coram rege* rot. 538. against the prior of S. Oswin in Northumberland. And it is provided, and declared by the statute of 36 E. 3. that if any man feeleth himselfe grieved, contrary to any article in any statute, he shall have present remedy in chancery (that is, by originall writ) by force of the said articles and statutes.

36 E. 3. cap. 9.

2. He may cause him to be indicted upon this statute at the kings suite, whereof you may see a precedent Pasch. 3 H. 8. Rott. 71. *coram rege*. Rob. Sheffields case.

3. ^a He may have an *habeas corpus* out of the kings bench or chancery, though there be no priviledge, &c. or in the court of common

^a See the resolution of all the judges of Eng-

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land in the answer to the articles of the clergy hereafter at large in the exposition of the statute of artic. Cler. to the 21. and 22. artic. Of the writ of *habeas corpus* see more in the exposition upon the stat. of W. 1. cap. 15.

common pleas, or *eschiquer*, for any officer or priviledged person there; upon which writ the gaoler must retourne, by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just, and lawfull, he shall be remanded to the former gaoler, but if it shall appeare to the court, that he was imprisoned against the law of the land, they ought by force of this statute to deliver him: if it be doubtfull and under consideration, he may be bailed.

In 5 E. 4. *coram rege*. Rot. 143. John Keasars case, a notable record and too long here to be recited.

10 Eliz. Rot. Leas case.

In 1 & 2 Eliz. Dier. 175. Scrogs case.

In 18 Eliz. Dier. 175. Roland Hynds case *in margine*.

4. He may have an action of false imprisonment, 10 H. 7. fol. 17. but it is entred in the court of common pleas Mich. 11 H. 7. Rot. 327. Hilarie Warners case, and it appeareth by the record, that judgement was given for the plaintife: a record worthy of observation.

5. ^b He may have a writ *de homine replegiando*.

Vide Marlebridge, cap. 8.

6. ^c He might by the common-law have had a writ *de odio, et atia*, as you may see before, cap. 26. but that was taken away by statute, but now is revived againe by the statute of 42 E. 3. cap. 1. as there it also appeareth. It is said in ^d W. 2. *Sed ne hujusmodi appellati, vel indictati diu detineantur in prisona, habeat breve de odio et atia, sicut in Magna Charta, et aliis statutis dicti est*: and by the said act of 42 E. 3. all statutes made against Magna Charta are repealed.

(9) *Nulli vendemus, &c.* ^e This is spoken in the person of the king, who in judgement of law, in all his courts of justice is present, and repeating these words, *nulli vendemus, &c.*

And therefore, every subject of this realme, for injury done to him in *bonis, terris, vel persona*, by any other subject, be he ecclesiasticall, or temporall, free, ^{*} or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

Hereby it appeareth, that justice must have three qualities, it must be *libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celeris, quia dilatio est quædam negatio*; and then it is both justice and right.

(10) *Nulli negabimus, aut differemus, &c.* These words have beene excellently expounded by latter acts of parliament, that by no meanes common right, or common law should be disturbed, or delayed, no, though it be commanded under the great seale, or privie seale, order, writ, letters, message, or commandement whatsoever, either from the king, or any other, and that the justices shall proceede, as if no such writs, letters, order, message, or other commandement were come to them. *Judicium redditum per defaultum affirmatur, non obstante breve regis de prorogatione judicii.*

That the common lawes of the realme should by no meanes be delayed, for the law is the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all; *lex est tutissima cassis*, and *sub clypeo legis nemo decipitur*: but the king may stay

^b Regist. 77.

F. N. B. 66.

Bract. 1. 3. f.

185.

^c Regist. 83.

268. F. N. B.

249: 258. Bract.

1. 3. f. 154.

^d W. 2. c. 29.

Gloc. cap. 9.

^e Mirror, c. 1. §.

5. cap. 2. § 13.

cap. 5. § 1, 2.

Fleta, 1. 2. c. 12.

Ocham, cap.

quid sponte of-

ferentibus F. N.

B. 96.

Rot. ^a 8 E. 3. nu.

7. 38 E. 3.

n. 23. 45

E. 3. n. 19,

51 E. 3.

n. 58. 5 H.

4. nu. 32.

20 R. 2. fines

134. 34 H. 6.

38. 2 E. 3. c. 10.

1 E. 4. cap. 1.

26 H. 8. cap. 3.

27 H. 8. cap. 11.

* [56]

2 E. 3. c. 8.

14 E. 3. c. 14.

20 E. 3. 1, 2.

11 R. 2. cap. 11.

Rot. Parl. 2 R. 2.

nu. 51.

Rot. Parl.

2 H. 4. nu. 64.

Regist. 186.

1 E. 3. f. 25.

2 E. 3. 3.

14 E. 3.

tit. Jour. 24.

May his owne suite, as a *capias pro fine*, for the king may respite his fine and the like.

All protections that are not legall, which appeare not in the Register, nor warrant'd by our books; are expressly against this branch, *nulli differemus*: as a protection under the great seale granted to any man, directed to the sherifes, &c. and commanding them, that they shall not arrest him, during a certaine time at any other mans suite, which hath words in it, *per prerogativam nostram, quam nolumus esse arguendam*; yet such protections have bene argued by the judges, according to their oath and duty, and adjudged to be void: as Mich. 11 H. 7. Rot. 124. a protection graunted to Holmes a vintner of London, his factors, servants and deputies, &c. resolved to be against law, Pasch. 7 H. 8. Rot. 66. such a protection disallowed, and the sherife amerced for not executing the writ. Mich. 13 & 14 Eliz. in Hitchcocks case, and many other of latter time: and there is a notable * record of auncient time in 22 E. 1. John de Mershalls case, *non pertinet ad vicecomitem de protectione regis judicare, imo ad curiam*.

(11) *Justitiam vel rectum*.] Wee shall not sell, deny, or delay justice and right. *Justitiam vel rectum*, neither the end, which is justice, nor the meane, whereby we may attaine to the end, and that is the law.

Rectum, right, is taken here for law, in the same sense that *jus*, often is so called. 1. Because it is the right line, whereby justice distributive is guided; and directed, and therefore all the commissions of oier, and terminer, of goale delivery, of the peace, &c. have this clause, *facturi quod ad justitiam pertinet, secundum legem, et consuetudinem Angliæ*, that is, to doe justice and right, according to the rule of the law and custome of England; and that which is called common right in 2 E. 3. is called common law, in 14 E. 3. &c. and in this sense it is taken, where it is said, *ita qd. stet recto in curia, i. legi in curia*. 2. The law is called *rectum*, because it discovereth, that which is tort, crooked, or wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injurie, and *injuria est contra jus*, against right: *recta linea est index sui, et obliqui*, hereby the crooked cord of that, which is called discretion, appeareth to be unlawfull, unlesse you take it, as it ought to be, *discretio est discernere per legem, quid sit justum*. 3. It is called right, because it is the best birth-right the subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong: *major hæreditas venit unicuique nostrum à jure, et legibus, quam à parentibus*.

4. Lastly, *rectum* is sometime taken for the right it selfe, that a man hath by law to land: as when wee say there lieth *breve de recto*, in so much that some old readers have supposed, that *rectum* in this chapter, should be understood of a writ of right, for which at this day no fine in the hamper is paid. As the goldfiner will not out of the dust, threds, or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to let passe any syllable of this law, in respect of the excellency of the matter.

18 E. 3. 47.
39 E. 3. 7. L.
5 E. 4. 122.
Pasch. 3 H. 4.
coram rege
Rot. 16. War-
wik. Rot. Parl.
5 H. 4. nu. 33-
22 ass. pl. 9.
9 H. 6. 50. b.
Fortesc. cap. 51.
F. N. B. 237.
240. 11 H. 4.
76. 31 E. 3.
quare imp. 161.
Mich. 11 H. 7.
Rot. 124. in
com. banc.
Pasch. 7 H. 8.
Rot. 66. in com.
banc.
Mich. 13. & 14.
Eliz. in com.
banc. Hitch-
cocks case.
11 H. 4. 57.
39 H. 6. 38.
* Pas. 22 E. 1.
Rot. 39. coram
rege Essex.
W. 1. cap. 1.
1 E. 3. cap. 14.
2 E. 3. cap. 8.
7 H. 4. cap. 14.
1 H. 4. cap. 1.
2 H. 4. cap. 1.
4 H. 4. cap. 1.
7 H. 4. cap. 1.
See the 1. part of
the Institut. sect.
234.
Injuria est in, seu
contra jus.

Cicero.

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C A P. XXX.

OMNES mercatores (1), nisi publice antea prohibiti fuerint, habeant solum et securum conductum, exire de Anglia, et venire in Angliam, et morari, et ire per Angliam, tam per terram, quam per aquam, ad emendum, vel vendendum, sine omnibus malis tolne-tis (2) per antiquas et rectas consuetudines (3), præterquam in tempore guerrinæ. Et si sint de terra contra nos nostram in principio guerræ, attachientur sine dampno corporum suorum, vel rerum, donec sciatur à nobis, vel a capitali iustitiano nostro, quomodo mercatores terræ nostræ tractantur, qui tunc inveniuntur in terra illa contra nos guerrinam. Et si nostri salvi sint ibi, alii salvi sint in terra nostra.

ALL merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolts, by the old and rightful customs, except in time of war. And if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, untill it be known unto us, or our chief justice, how our merchants be intreated there in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us.

(12 Rep. 33. 2 Roll. 115. 1 Bullstr. 134. 9 Ed. 3. stat. 1. c. 1. 14 Ed. 3. stat. 1. c. 2. 25 Ed. 3. stat. 4. c. 2. 2 R. 2. stat. 1. c. 1. 11 R. 2. c. 7.)

(1) Omnes mercatores.] This chapter concerneth merchant strangers.

First it is to be considered, what the auncient lawes, before this statute, were concerning this matter.

Mirror, cap. 1.
§ 3.

Int. leges Ethel.
cap. 2.

By the auncient kings (amongst whom king Alfred was one) *defendu fuit que nul merchant aliē ne hantast Angleterre forsque aux 4 foires, ne que nul demurraſt in la terre ouſter 40. jours. Mercatorū navigia, vel inimicorum quidem, quæcunq; ex alto (nullis jaſtata tempeſtatibus) in portum aliquem invehentur, tranquilla pace fruuntor; quin etiam ſi maris æſta fluctibus ad domicilium aliquod illuſtre, ac pacis beneficio donatum navis appulerit inimica, atq; iſtuc nautæ conſugerint, ipſi et res illorum omnes anguſta pace potiuntor.*

2. It is to be ſeene what this ſtatute hath provided.

1. That before this ſtatute, merchant ſtrangers might be publicly prohibited, *publice prohibeantur*. And this prohibition is intendable of merchant ſtrangers in amitie, for this act provideth afterward for merchant ſtrangers enemies; and therefore the prohibition intended by this act, muſt be by the common or publique counsell of the realme, that is, by act of parliament, for that it concerneth the whole realme, and is implied by this word (*publice*.)

2. That all merchant ſtrangers in amity (except ſuch as be ſo publicly prohibited) ſhall have ſafe and ſure conduct in 7 things.

1. To depart out of England. 2. To come into England. 3. To tarry here. 4. To goe in and through England, as well by land

as

as by water. 5. To buy and to sell. 6. Without any manner of evil tolls, 7. By the old and rightfull customs.

Now touching merchant strangers, whose soveraigne is in warre with the king of England.

There is an exception, and provision for such, as be found in the realme at the beginning of the warre, they shall be attached with a priviledge, and limitation, viz. without harme of body, or goods, with this limitation, untill it be knowne to us, or our chiefe justice (that is our guardien, or keeper of the realme in our absience) how our merchants there in the land in warre with us shall be intreated, and if our merchants be well intreated there, theirs shall be likewise with us, and this is *jus belli*. *Et in republica maxime conservanda sunt jura belli*.

But for such merchant strangers as come into the realme after the warre beginne, they may be dealt withall as open enemies: and yet of auncient time three men had priviledge granted them in time of warre. *Clericus, agricola, et mercator, tempore belli. Ut oretq; colat, commutet, pace fruuntur*.

^a The end of this chapter was for advancement of trade, and traffique; the meanes for the well using, and intreating of merchant strangers in all the particulars aforesaid, is a matter of great moment, as appeareth by many other acts of parliament, for as they be used here, so our merchants shall be dealt withall in other countries.

(2) *Mala tolmeta.*] ^b Evil tolls.

This word *tolnetum*, and *telonium*, and *theolonium* are all one, and doe signify in a generall sense, any manner of custome, subsidie, prestation, imposition, or summe of money demanded for exporting, or importing of any wares, or merchandizes, to be taken of the buyer. In both these senses it is here taken of severall kind of tolls: more shall be said hereof, in the exposition of the statutes of W. 1. and W. 2. In the meane time see John Webbes case, lib. 8. fol. 46.

^c They are called *mala tolmeta*, when the thing demanded for wares or merchandizes, doe so burden the commodity, as the merchant cannot have a convenient gaine by trading therewith, and thereby the trade it selfe is lost or hindered. And in divers statutes *maletout* for *maletot*, or *maletout* is a French word, and signifieth an unjust exaction.

Now this act after it hath dealt privatively, *sine omnibus malis tolmetis*, it goeth on for more surety affirmatively.

(3) *Per antiquas et rectas consuetudines.*] That is, by auncient and right duties, due by auncient and lawfull custome, which hath been the auncient policy of the realme to encourage merchants strangers, they have a speedy recovery for their debts and other duties, &c. *per legem mercator;* which is a part of the common law.

This word *consuetudo*, hath in law divers significations. 1. For the common law, as *consuetudo Angliæ*. 2. For statute law, as *contra consuetudinem communi concilio regni edit*. 3. For particular customs, as gavelkind, borough English, and the like. 4. For rents services, &c. due to the lord, as *consuetudines et servitia*. 5. For customs, tributes, or impositions, as *de novis consuetudinibus levatis in regno, sive in terra, sive in aqua*. 6. Subsidies, or customs granted by common consent, that is, by authority of parliament, *pro bono publico*, and these be *antiquæ, et rectæ consuetudines* intended

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Regist. 129. de
areit fact. super
bonis mercator.
alienig.

Rot. Parliam.
Mich. 18 E. 1.
coram rege fol.
7. repressil.

Tr. 33 E. 1.
cons. rege rot.
127. 27 E. 3.
stat. 2. cap. 17.

lawe of marke.
Rot. parl. 11 H.
4. nu. 66.

4 H. 5. c. 7.
14 H. 6. c. 7.
18 H. 6. c. 9.

Mat. Par. 966.
2 E. 3. c. 5.
9 E. 3. c. 1.

14 E. 3. c. 2.
25 E. 3. cap. 2.
11 R. 2. c. 7.

14 R. 2. cap. 9.
16 R. 2. cap. 1.
b Lib. 8. fol.

46. John Webbs
case. See the
exposition of
W. 1. c. 31.

46 E. 3. barre
215. 39 E. 3. 13.
b. F. N. B. 227.
d. West. 1. c.

30. W. 2. cap.
25.
c See Rot. par-
lia. 17 E. 3. nu.

27. 28. and
21 E. 3. nu.
29. Mal-tot ta-
ken in good part.

See the expositio
of W. 1. cap. 31.
Glanvil. lib. 9.
c. 7. lib. 12. cap.

9. 10. Regist. 4.
159. F. N. B. 10.
151. cap. lunc-

ris. cap. Elichea-
tre. See before
c. 4. cap. Itipis-
ris.

by this act, this agreeth with that, which hath been said before in the end of the exposition upon the eight chapter.

Hereby it appeareth that the king cannot set any new impost upon the merchant, and therefore this act provideth not only affirmatively, viz. *per antiquas, et rectas consuetudines*, but privately also, *sine omnibus malis tolactis*, within which words new impositions are included, and are here called *mala tolmeta*, as opposite to ancient and rightfull customes, or subsidies graunted by authority of parliament.

And where some have supposed, that there was a custom due to the king by the common law, as well of the stranger, as of the English, called *antiqua custumia*, viz. for woolls, wooll-fells, and leather, that is to say, for every sack of wooll containing 26 stone, and every stone 14 pound, vj. s. viij. d. and for a last of leather, xij. s. iiij. d. Certain it is, that those customes had their beginning by common consent by act of parliament, for king E. 1. by his letters patents reciteth, *cum prelati, magnates, et tota communitas quandam novam consuetudinem nobis et hæredibus nostris de lanis, pellibus, et coriis, viz. de sacco lane dimid' marc' de 300. pellibus dimid' marc', et de lasto corii xiii. s. iiij. d. &c.* Herein foure things are to be observed. 1. That these customes had their creation by authority of parliament, and were not by the common law, appearing by these words, *quandam novam consuetudinem*, so as it was new, and not old. 2. That this new custome was graunted to king Edw. 1. proved by this word *nobis*. 3. That it was graunted at the parliament holden 3 E. 1. commonly called W. 1. (though the record thereof cannot be found) for the said patent bears' date 10. Nov. anno 3 E. 1. which was neare the ending of that yeare, and the parliament was holden in *Clauso Pasche*. before. 4. That here *consuetudo* signifieth a custome, or subsidy graunted by common consent by parliament, and in that sense it is here taken, and likewise in the statute of 51 H. 3. *statutum de seaccario*, for in 48 H. 3. proclamation was made, *contra suggerentes, &c. Regem velle exigere tallagia inconsueta, et introducere extraneos*.

And herewith agreeth the act of parliament commonly called *confirmationes cartarum* (which is but an explanation of this branch of *Magna Charta*) wherein it is enacted, that for no occasion any aide, tasks, or takings shall be taken by the king, or his heires, but by the common assent of the realme, saving the auncient aides, and takings due and accustomed.

And whereas the most of the whole comminalty of the realme finde themselves hardly grieved of the maletout (or ill toll) of woolls, that is to say, of every sack of wooll 40. s. and prayed the said king to release the same, thereupon the said king did release the same, and graunted further for him and his heires, that no such thing should be taken without their common assent, and their good will: and in that act there is a saving, *saue a nous, et nous heires la custume de laynes, pealx, et quiures avant, granté per la commualtie avandit*; So as this act of parliament proveth that the said custome of vj. s. viij. d. for wooll, and xij. s. iiij. d. for leather was graunted by parliament.

By the statute *de tallagio non concedendo* (which is but an explanation of this branch of the statute of *Magna Charta*) it is provided: *Nullum tallagium vel auxilium per nos vel hæredes nostros in regno nostro ponatur, seu levetur sine voluntate et assensu archiepiscoporum, episcoporum, comitum,*

See the statute of Carlile.

35 E. 1. for this word imposition, and from whom it came.

Dier, 31 H. 3.

43. 1 Mar. 92.

1 Eliz. Dier, 165.

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Rot. Pat. 3. E.

1. m. 1. rot. fin-

num. 3 E. 1. m.

24. Mich. 26 E.

1. int' return.

brevium, ex pte.

remem. The-

saur' in Scac.

Rot. Pat. anno

48 H. 3. à tergo.

Anno 25 E. 1.

See more in the exposition of that statute.

Rot. Parliam.

13 H. 4. nu. 18.

A new office graunted with a fee in charge of the subject, is against this act of 25 E. 1. and of 34 E. 1. hereafter following,

Ann. 24 E. 1.

See more in the exposition of this statute.

ritum, baronum, militum, burgenſum, et aliorum liberorum comit' de regna noſtro; ſo as E. 1. in conclusion added the effect of the clause concerning this matter, which in his exemplification he had omitted out of *Magna Charta*.

See *cap. itineris de novis consuetudinibus levatis in regno, sive in terra, sive in aqua, &c.* where *consuetudines* are taken for *customes*.

Upon grant to merchant strangers of divers privileges, liberties, and immunities they granted to the king and his heirs, *de quolibet sacco lane 40 d. de incremento ultra custumam antiquam dimid' marc' quæ prius fuerit persoluta et sic pro lasto coriorum dimid' marc', et de trescentis pelibus lanatis 40 d. ultra certum illud, quod et antiqua custuma fuerit prius datum.* Note here the custome which was granted 3 E. 1. is here called *antiqua custuma*, and this new custome is called *nova custuma*, and sometime the one is called *magna custuma*, and the other *parva custuma*.

2. Here it appeareth that merchants strangers paid the former custome.

Moreover by that charter, poundage of three pence upon the pound was granted to the king, and his heirs by the merchant strangers, *et de quolibet vini nomine custumæ duos solidos, &c.* and this at this day is called butlerage, and is paid onely by merchant strangers; but prisage is paid by the English onely, except the citizens of London, and this is an ancient duty: for I finde it accounted for in the raigne of H. 3. by the king's butler, and is called *certa prisæ*, which at the first was granted in lieu and satisfaction of purveyance for wines. And lastly, by that charter it is granted, *quod nulla exactio, prisæ, vel præjatio, aut aliquod aliud onus super personas mercatorum alienorum præiudicet, seu bona eorundem aliquatenus imponatur contra formam expressam superius concessam*: So as no imposition can be set without assent of parliament upon any stranger.

It was ordered and resolved by divers prelates, earls, and barons, by force of the king's commission, that no new customes could be levied, nor ancient increased, without authority of parliament, for that should be against the great charter, anno 6 E. 3. Rot. Parliament, nu. 4. that no tallage shall be assessed but in such manner as it hath been in time of his ancestors, and as it ought to be, and disannull all others.

In anno 11 E. 3. it was made felony to carry wooll out of the realme, the end whereof was, that our wooll should be draped into cloth. But the king wanting made this use of this act: in the 12 and 13 years of his raigne he made dispensations of that statute in consideration of money paid: but that statute lived not long. In 13 E. 3. a great imposition was set upon woolls, and it is called a great wrong, *cum populus regni nostri variis oneribus, tallagiis, et impositionibus hactenus prægravetur, quod dolentes referimus*, and there doth excuse himselfe.

Note here is the word *impositiones* first used, imposed by any king, in any record that I have observed, and doe remember.

Anno 14 E. 3. cap. 21. A subsidie granted to the king of wooll, woollfells, and leather, &c. by parliament, for a certain time in respect of the warres, for which the king graunteth, that

Cap. itineris.

Rot. chartarum.
31 E. 1. nu. 44.
Charta Mercatoria.

Rot. Pat. anno
40 H. 3.

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Fleta, lib. 2.
ca. 21.

Rot. ordinatio-
num. anno 5 E.
2, in Scaccario.

11 E. 3. cap. 1.
Rot. parl. 13 E.
3. nu. 12. li-
cence, &c. & 14
E. 3. nu. 3. li-
cence.

Rot. alinance.
12 E. 3. memb.
22. in dori.

14 E. 3. cap. 21.

after that time, he nor his heires would take more then the old custome.

After this time ended, the king entred into a new device to get money, viz. that by agreement and consent of the merchants, the king was to have 40s. of a sack of wooll, &c. but hereof the commons (that in troth were to beare the burden, for that the graunt will not be the lofer) complained in parliament, for that the graunt of the merchants did not binde the commons, and that the custome might be taken according to the old order, which in the end was graunted, and that no graunt should be made but by parliament.

No charge shall be levied of the people, if it were not graunted in parliament.

In 21 E. 3. by authority of parliament, a custome was graunted of cloth, for that the wooll was for the most part converted into cloth, which you may see in Orig. Scaccar. 24 E. 3. Rot. 13.

By the statute of 27 E. 3. cap. 4. in print, a subsidie of every cloth to take of the feller (over the custome's thereof due, that is, such as then endured for a time, and were graunted by parliament) that is to say, of every cloth of assise, wherein there is no grain, 4. d. &c.

And here it is worthy of observacion, that there were two causes of the making of this statute. 1. For that for cloth no custome was due other then by the act of 21 E. 3. 2. For that wooll being converted to a manufecture, and made into cloth, the ancient custome of *dimid.* mark for a sack of wool was not by law payable, because the wooll was turned into another kinde, albeit the cloth was made of the wooll; and this doth notably appeare by the records of the exchequer, one of them in the same year that the act of 27 E. 3. was made.

Ac jam magna pars lanæ dilecti regni nostri eodem regno pannificetur, de qua custuma aliqua nobis non est soluta; and there it appeareth that that was the cause, of giving to the king a subsidie for cloth by the said act of parliament, of 27 E. 3. And yet if in any case the king by his prerogative might have set any imposition, he might have set in that case, because as it appeareth by the record, by making of cloth hee lost the custome of wooll.

Rot. parlam. 45 E. 3. No imposition or charge, &c. shall be set without assent of parliament.

50 E. 3. Richard Lions, a merchant of London punished for procuring new impositions, and so was the lord Latimer, the kings chamberlaine. And in the same parliament, nu. 163. upon complaint that new impositions were set, the king in parliament assented that the ancient custome should be holden, and no new imposition set.

In the raigne of E. 3. the black prince of Wales having *Aquitaine* granted to him, did lay an imposition of fuage or focage, *à foco*, upon the subjects of that dukedome, viz. a shilling for every fire called hearth silver, which was of so great discontentment, and odious to them, as it made them to revolt.

And no king since this time imposed by pretext of any prerogative, any charge upon marchandises imported into, or exported out of this realme, untill queen Maries time. See the statute of 11 R. 2. cap. 9. & Rot. Parliament. 8 H. 6. num. 29.

And in 3 H. 5. the subsidie of tunnage and poundage was graunted

Rot. parlam.
17 E. 3. nu. 28.
25 E. 3. nu. 22.
36 E. 3. nu. 26.

Rot. parlam.
21 E. 3. nu. 16.
Rot. parlam.
21 E. 3. Dier,
1 Eliz. 165.
Int' or gen. Scac.
24 E. 3. Rot. 13.
27 E. 3. cap. 4.

Int. original. de
Scaccar. anno
24 E. 3. Rot. 4.
Vide simile,
ibid. 24 E. 3.
Rot. 13.
See the first part
of the Institutes,
fol. 49. b.

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Rot. parlam.
45 E. 3. nu. 42.
Rot. parlam.
50 E. 3. nu. 17,
28.
Nu. 163. et vide
ibidem, 191.

Rot. pat. anno
25 E. 3. created
duke of Aquit-
taine.

Rot. Parl. 8 H.
6. nu. 29. &
Rot. Parl. 28 H.
6. nu. 35.

Rot. parl. 3 H.
5. nu. 50. Stat. 2.

graunted to king H. 5 during his life, in respect of the recovery of his right in France (which was the first graunt for life of that kinde) yet therein was a *proviso*, that the king should not make a graunt thereof to any person, nor that it should be any precedent for the like to be done to other kings afterwards; but yet all the kings after him have had it for life, so forcible is once a precedent fixed in the crown, adde what *proviso* you will.

And this graunt by parliament of the subsidy of tannage and poundage to the king is an argument, that the king taking it of the gift of the subject had no power to impose it himselve.

The lords and commons cannot be charged with any thing for the defence of the realme, for the safeguard of the sea, &c. unlesse it be by their will in parliament, that is, in the graunt of a subsidy, whereunto the king assented.

Non potest rex subditum renitentem onerare impositionibus,

King Philip and queen Mary, graunted by letters patents to the major, bayliffes, and burgesies of Southampton, and their successors, that no wines called Malmeseyes to be imported into this realme by any denizen, or alien, should be discharged or landed at any other place within this realme, but onely at the said town and port of Southampton, with a prohibition, that none should doe to the contrary upon pain to pay treble custome to the king and queen, &c. And for that Anthony Donate, Thomas Frederico, and other merchant strangers bought divers butts of Malmesey, &c. and landed them at Goore, and in Kent, Gilbert Gerard the attourney generall, informed in the exchequer, against the said merchant strangers for the said treble custome, &c. Upon which information, as to the said treble custome, the said Anthony Donat demurred in law, &c. And this case was argued in the exchequer chamber by counsell learned on both sides, and upon conference had, two points were resolved by all the judges. 1. That the graunt made in restraint of landing of the said wines was a restraint of the liberty of the subject, against the lawes and statutes of the realme. 2. That the assessment of treble custome was meerly void, and against the law. As it appeareth by the report of the lord Dier under his hand (which I have in my custody.) But after by act of parliament, in anno 5 Eliz. the said charter is established as to merchant strangers onely, but not against subjects.

And where imposts, or impositions, be generally named in divers acts of parliament, the same are to be intended of lawfull impositions, as of tannage, and poundage, or other subsidies imposed by parliament, but none of those acts or any other doe give the king power at his pleasure to impose. See the first part of the Institutes, sect. 97.

It is then demaunded, by what law custome is paid for kerseyes, whites, plaine, straits, and other new draperies, made of wooll; for it appeareth by acts of *parliament, and common experience, that all these pay custome to the king. To this it is answered, that a proportionable subsidy, or custome is paid for them within the equity of the said statute of 27 E. 3. cap. 4. and likewise a proportionable alnage is also due for them by that act.

Hil. & Pasch. anno 2 Jacobi regis, great questions were moved, whether frisedoes, bayes, northern cottons, northern dozens, cloth-rash, durances, perpetuanoes, tuft-mocadoes, sackcloth, fustians, worsteds, stuffes made of worsted yarne, &c. were within the said act

See in the fourth part of the Institutes, cap. of the high court of parliament, more of the subsidy of tannage.

Rot. Parliam.
13 H. 4. nu. 10.

Fortesc. c. 9. &
18,

Int' communia
de termino S.
Trin. anno 1.
Eliz. Rot. 73.

Mag. Charta, ca.
30. 9 E. 3. c. 1.
14 E. 3.
25 E. 3. cap. 2.
27 & 28 E. 3.
of the staple.
2 R. 2. cap. 1.

23 H. 6. cap.
18. 14 H. 8. ca.
4. 13 El. c. 4.
1 Jac. ca. 13.
3 Jac. ca. 6.

Int' decreta in
camera Scac.
Mich. 3 & 4 El.
Mich. 32 &
33 Eliz. Mic. 32
& 40 Eliz.

* [62]

of 27 E. 3. as concerning the subsidy, and alnage: and if they were not, whether the king by his prerogative might not impose a reasonable subsidy, or custome upon them proportionably to the cloth mentioned in the statute of 27 E. 3. And this being questioned before the lords of the counsell, they wrote to the judges to be certified what the law was in these cases, who upon mature deliberation, the 24 of June 1605, resolved, and so certified the lords by their letters under all their hands, that all frisedoes, bayes, northern dozens, northern cottons, cloth-rash, and other new drapery made wholly of wooll, of what new name soever made, as new drapery for the use of mans body, are to yeeld subsidy, and alnage according to the statute of 27 E. 3. and within the office of the auncient alnager, as may appeare by severall decrees in that behalfe in the exchequer, in the time of the late queen: but as touching fustians, canvas, and such like made meerly of other stufte then wooll, or being but mixed with wooll, it was resolved by all the judges, that no charge could be imposed for the search or measuring thereof, but that all such letters patents so made are voyd, as may appeare by a record of 11 H. 4. wherein the reason of the judgement is particularly recited, which the judges thought good in their letters to set downe as followeth.

Note this,

King H. 4. granted the measuring of woollen cloth, and canvas, that should be brought to London, to be sold by any stranger or denizen (except he were free of London) taking an ob. of every whole peece of cloth so measured of the seller, and one other ob. of the buyer, and so after that rate for a greater or lesser quantity, and one penny for the measuring of an C. ells of canvas of the seller, and so much more of the buyer; and though it were averred that two other had enjoyed the same office before with the like fees, viz. one Shearing by the same kings graunt, and one Clithew before by the graunt of R. 2. (and the truth was, Robert Pooley in 5 E. 3. and John Mareis, in 25 E. 3. had likewise enjoyed the same) yet amongst other reasons of the said judgement, it was set downe, and adjudged that the former possession was by extortion, coercion, and without right, and that the said letters patents were in *operationem, oppressionem, et depauperationem subditorum domini regis, &c. et non in emendationem ejusdem populi*; and therefore the said letters patents were voyd. And as touching the narrow new stufte made in Norwich, and other places of worsted yarn, it was resolved that it was not grauntable, nor fit to be granted, for there was never any alnage of Norwich worsteds, and for these stufes, if after they be made, and tucked up for sale by the makers thereof, they should be again opened to be viewed, and measured, they will not well fall into their old plights, &c. as by the said letters it more at large appeareth. These letters were openly read at the counsell table, and well approved by the whole counsell, and the lords commanded the same to be kept in the council-chest to be a direction for them to answer suitors in these cases.

But three judgements in the exchequer have been cited for proofoe, that the king hath power to set impositions upon merchandizes exported, and imported.

1. A judgement given in the exchequer in an information against Germane Cioll for 40. s. set by queen Mary upon every tun of wine, of the growth of France to be brought into the realme. But the case there was this, the attourney generall informed, that where
king

13 E. 3. ex pte Remem. The-saurar. Rot. par-liam. 25 E. 3. enacted according to this resolution.

30 E. 3. Compot. Forinsec. in Scaccar, compot. Joh. Marci-
is.

Pasch. 1 Eliz. in Scacc. ex pte. remem. regis.

king Philip and queen Mary by their proclamation 30 Martii, in the 4 and 5 yeares of their raigne, did will and straitly command, that no wines of the growth of France, should be brought into this realme. without speciall licence of the said king and queene, under paine of forfeiture of such wine to the king and queene, *cumq; etiā dicit nuper rex et regina de advisamento concilii sui ad tunc ordinaver et decreverunt, quod quælibet persona, quæ in hoc regnum Angliæ induceret hujusmodi vina contra formam proclamationis prædictæ, solveret pro quolibet dolio hujusmodi vini 40.s. vocat impost. &c.* and that German Ciol, against the forme and effect of the said proclamation, had brought into the realme 338. tunnes of wines of the growth of France, and had not paid 40.s. for each and every tunne: the defendant pleaded a licence from the said king and queene, dated the 9. or Decemb. anno 1 & 2, to bring into the realme 1500. tunnes of wine, of the growth of Fraunce, in strangers bottoms, with a *non obstante* of any law, statute, or proclamation made or to be made to the contrary, whereupon the demurrer was joyned.

In this record these things are to be observed, first that a proclamation prohibiting importation of wines upon paine of forfeiture, was against law: for it appeareth not, that any warre was betweene the realmes. 2. The proclamation was made of purpose to set an imposition, for the 40.s. is imposed upon them only, and upon such as should bring in wines against the said proclamation, so as the proclamation was the ground of this information. 3. The king and queene by advice of their counsell, did order, and decree, &c. and sheweth not how, or by what meanes this order and decree was made: the pleading of such a former licence so insufficiently sheweth, that it was by agreement and consent.

2. The executors of customer Smith, were charged in a speciall information for receiving an imposition of iii. s. iiii. d. set by queene Elizabeth, under her privy signet, upon every hundred weight of allome made within the dominions of the pope, and judgement in the exchequer was given against them: the reason of this judgement was, for that customer Smith received the same as due to the queene, and the issue was joyned, *quod prædicti executores non tenebantur ad computum, &c.* and the validity of the imposition was never questioned.

3. A judgement was given in the exchequer, for an imposition set upon currants, but the common opinion was, that that judgement was against law, and divers expresse acts of parliament; and so by that which hath been said, it doth manifestly appeare.

To conclude this point, with two of the *maximes* of the common law. 1. *Le common ley ad tielment admeasure les prerogatives le roy, que ilz ne tolleront, ne prejudiceront le inheritance d'aucun*, the common law hath so admeasured the prerogatives of the king, that they should not take away, nor prejudice the inheritance of any: and the best inheritance that the subject hath, is the law of the realme. 2. *Nihil tam proprium est imperii, quam legibus vivere.*

Upon this chapter, as by the said particulars may appeare, this conclusion is necessarily gathered, that all monopolies concerning trade and traffique, are against the liberty and freedom, declared and graunted by this great charter, and against divers other acts of parliament, which are good commentaries upon this chapter.

[63]

Mich. 38 & 39
Eliz. in Scaccario
Rot. 319.

In mem. Scaccar. int. com.
Pasc. 4 Jacob.
Rot. 32. in inform. vers. John Bate de London mercat. Pl. com. 236. in the B. Baileys case.
Fortesc. sepe.

2 E. 3. c. 9.
9 E. 3. c. 1.
25 E. 3. c. 2.
2 R. 2. c. 1.
11 R. 2. cap. 7.
6 R. 2. cap. 1.
12 H. 7. cap. 6.

Mirror, c. 5. § 5.

4 E. 4. c. 15.

5 H. 4. c. 9.

27 H. 6. cap. 3.

17 E. 4. cap. 1.

3 H. 7. cap. 8.

* See hereafter
the exposition
upon the statutes
of employments.

*Le point del conge del demurrer des merchants aliens est issint inter-
pretable, que ceo ne soit in prejudice des villes, ne des merchants dan-
gleterre, et il soient serements al roy et plevyes filz demurront plus que
40 jours.*

For the well intreating and ordering of merchant strangers and denizens, and for * due employment of their money upon the native commodities of this realme, many statutes have beene made since this great charter, and have been excellently expounded in the raigne of queene Elizabeth, but that matter belongs not to this place.

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CAP. XXXI.

SI quis tenuerit de aliqua escaeta, sicut de honore Wallingford, Notting. Bolon. et de aliis escaetis (1) quæ sunt in manu nostra, et sint baroniæ, et obierit hæres ejus, non det aliud relevium, nec faciet nobis aliud servitium, quam faceret baroni, si baronia esset in manu baronis, et nos eodem modo eam tenebimus, quo baro eam tenuit. Nec nos occasione talis baroniæ, vel escaetæ habebimus aliquam escaetam, vel custodiam aliquorum nostrorum hominum, nisi de nobis alibi tenuerit in capite illi qui tenuit baroniam, vel escaetam illam.

IF any man hold of any eschete, as of the honour of Wallingford, Nottingham, Boloin, or of any other eschetes which be in our hands. and are baronies, and die, his heir shall give none other relief, nor do none other service to us, than he should to the baron, if it were in the baron's hand. And we in the same wise shall hold it as the baron held it; neither shall we have, by occasion of any barony or eschete, any eschete or keeping of any of our men, unless he that held the barony or eschete otherwise held of us in chief.

(Bro. Livery, 58. Bro. Tenures, 57, 61, 94, 99. 26 H. 8. pl. 3. 2 Inst. 14. Regist. 184. 1 Ed. 3. stat. 2. c. 13. 1 Ed. 6. c. 4.)

By this chapter it is declared, and enacted, that if any man hold of any escheate, as of any honour, or of other escheats, which are baronies, and were in the kings hands; first, if he die, his heir being of full age, his heir shall give no other reliefe to the king then he did to the baron. 2. Nor doe none other service to the king, then he should have done to the baron. 3. That the king shall hold the honour or baronie as the baron held it, that is, of such estate, and in such manner and forme, as the baron held it. 4. The king shall not have by occasion of any barony, or escheate, any escheate but of lands holden of such baronie. 5. Nor any wardship of any other lands then are holden by knights service of such baronie, unless he, which held of the baronie, held also of the king by knights service in *capite*.

All this is meereley declaratory of the common law, and here it appeareth that he that holdeth of the king, must hold of the person of the king, and not of any honor, barony, mannor or feignory: and it appeareth farther in our books, that he that holdeth of the king in chiefe, must not only hold of the person of the king, but the tenure must be created by the king, or some one of the progenitors,

See the first part
of the Institutes,
sect. 103. 47 E.
3. 21. F. N. B. 5.

x

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or predeceffors kings of this realme, to defend his person and crowne, otherwise he fhall have no prerogative by reafon of it, for no prerogative can be annexed to a tenure created by a fubject. Note here is not named the honour of Lanc. which was an auncient honour ever fince the conqueft, which E. 3. raifed to a count palatine, as in the 4. part of the Inftitutes, cap. Duch. of Lancatre appeareth. See 28 H. 6. 11. *per tous les juftices*. 1 E. 6. Bro. trav. 53. Stamford Prerog. 29. b.

(1) *De alijs efcheatis*.] Some queftion hath been made of thefe words, for fome have faid that thefe words are to be underftood of common efcheats, as where the lord dieth without heire, or where he is attainted of felony: but where the lord is attainted of high treafon, there the king hath the land by forfeiture of whomsoever the land is held, and not in refpect of any efcheate by reafon of any feigniorie: and therefore where William Riparave a Norman, held lands in fee of the king, as of the honour of Peverell, and Riparave forfeited his faid land for treafon, and the king feifed it as his efcheate of Normandy, in this cafe the land fo forfeited was no part of the honour, as it fhould have been, if it had come to the king, as a common efcheate, for it cometh to the king by reafon of his perfon, and crowne, and therefore if he graunt it over, &c. the patentee fhall hold it of the king in chiefe, and not of the honour. And all this is to be agreed, but yet the tenants that held before of the honour by knights fervice, cannot hold of the king in chiefe. 1. For that they hold not of the perfon of the king, but of the honour. 2. Be- caufe the tenure was not created by the king, or any of his progenitors, as hath been faid.

And fo doth Brañton, who wrote foone after the ftatute, expound this great charter to extend to forfeiture of baronies for treafon, as of the Normans.

And yet to make an end of all ambiguities and queftions, the ftatute of 1 E. 6. was made, which is, as the words be, a plain declaration and refolution of the common law. Likewise the ftatute of 1 E. 3. which provideth, that where the land, that is holden of the king, as of an honour, is aliened without licence, no man fhall be thereby grieved, is alfo a declaration of the common law.

By this chapter it appeareth, that a fubject may have an honour.

47 E. 3. 21. Ri-
paraves cafe.

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Brañton, l. 2.
fol. 87. b. 30 H.
8. tenures. Br.
44. 29 H. 8.
livery. 28 Br.
36 H. 8.
Dier 58.
1 E. 6. cap. 4.
1 E. 3. cap. 13.
See the 1. part of
the Inftitutes,
feft. 1.

C A P. XXXII.

NULLUS liber homo det de cæ-
tero amplius alicui, vel vendat
[alicui] de terra fua, quam ut de re-
fiduo terræ fuæ poffit fufficienter fieri
domino feodi fervitium ei debitum, quod
pertinet ad feodum illud.

NO freeman from henceforth fhall
give or fell any more of his land,
but fo that of the refidue of the lands
the lord of the fee may have the fer-
vice due to him, which belongeth to
the fee.

Tr. 1. E. 1. coram rege. Not. & Derb. a declaration made of this act. Brañt. l. 1. Britton. fol. 83. Fleta. l. 3. cap. 3. Mirror, c. 5. § 2. Customier de Norm. cap. 116. (1 Inft. 43. a. 18 Ed. 1. stat. 1. c. 2.)

1. First

1 First it is to be seene, what the common law was before this statute.

2 What is wrought by this statute, where the lands are holden of the king.

10 H. 7. 11.

3 What this statute hath provided in case where lands are holden of a subject.

Before this statute, in case where the tenure was of a common person, the tenant might have made a feoffment of a parcell of his tenancy to hold of him, for the feigniori remained intire as it was, and the lord might distreine in the tenancy paravaile for his rent, and service; but at the common law, he could not have given a part of his tenancy to be holden of the lord, for the tenant by this act could not divide the feigniori of the lord which was intire, for at the beginning the lord reserved his feigniori out of the whole tenancy, and might distreine in every part thereof for his feigniori, but if the tenant might have made a feoffment of part to hold of the lord, then had he secluded the lord of his liberty to distreine for the whole feigniori in every part thereof.

At the common law the tenant might have made a feoffment of the whole tenancy to be holden of the lord, for that was no prejudice at all to the lord.

* But in the kings case it was doubted, whether his tenant might have given part of the tenancy to hold of himselfe, because the land, and the profit that might come to the king thereby, was removed farther off from him, and the mesnalty was ever of lesse value, then the land, and for that cause the tenancy was called paravaile: and in 18 E. 1. the king answered to a petition in parliament, *rex non vult aliquem medium*, &c. and this question remained after this statute about the space of 133. years, viz. till the statute of 34 E. 3. was made, whereby it is provided, that alienations of lands made by tenants, which held of H. 3. or of other kings before him, to hold of themselves, that the alienations should stand in force, saving to the king his prerogative of the time of his great grandfather, his father, and his own, whereby it appeareth that this prerogative to have a fine for alienation, began in the reign of H. 3. which was by this act, and therefore he beginneth with H. 3. his great grandfather.

c To the second point by this act, where lands are holden of the king, as king, in *capite*, be it by knights service, or in socage in *capite*; and aliened without licence, there * groweth, as hath been said, to the king a fine: for by the common law it was against the nature and purity of a fee-simple, for the tenant to be restrained from alienation.

But some did hold, that upon this act the land so aliened without licence was forfeite to the king, by reason of these words, *nullus liber homo det*, &c. and others did hold the contrary, that upon these words, the land was not forfeited, but that it should be seised in the name of a distresse, and a fine to be paid for the trespass, which I take to be the better opinion; and the reason why our books speake, that no fine was due before 20 H. 3. is, for that about that yeare H. 3. being of full age (as hath been said) did establish and confirme this great charter, but in truth it was in 21 H. 3. as by the charter it selfe appeareth.

But this question depended about the space of 100 years, &c. and was not determined untill the statute made in 1 E. 3. whereby it

a 29 Aff. p. 19.
20 Aff. p. 17.
26 Aff. p. 37.
20 E. 3. avowry.
Rot. parl.
29 E. 3. nu. 18.
b Rot. par.
18 E. 1.

c 34 E. 3. c. 15.
See the Stat. of
W. 3. de quia
emptores terr.
an. 18 E. 1.
F. N. B. 143. b.
& 235. c.
13 Eliz. Dier.
299. b.

d Rot. par. an.
21 H. 3. nu.
4 H. 3. confirm-
ed this chart.
made 9 H. 3.
e 20 Aff. p. 17.
26 Aff. p. 37.
14 H. 4. 2. 3.
15 E. 4. 13.
Stamf. prer.
c. p. 6. fo. 27.
28. 9 E. 3. 36.
Hil. 13 E. 3. co-
ram rege Norff.
in Turri.

* [66]

f 1 E. 3. c. 12.
See the statute of
quia emptores

it is enacted, that the king shall not hold them as feofreite in such case, but that of lands so aliened there shall be from thenceforth, a reasonable fine taken in the chancery, by due proces, which act was but an exposition of this chapter of *Magna Charta* as to lands holden of the king *in capite* aliened without licence, and extendeth to lands holden of the king by grand serjantie aliened without licence.

To the 3. the great doubt upon this act was, that in as much as this act was a prohibition generall, and imposed no paine or penalty, what paine the tenant, or his feoffee should incurre, if he did the contrary; and by the common opinion this act was thus interpreted: that when a tenant of a common person did alien parcell contrary to this act, the feoffor himselfe during his life should not avoide it, *quia nemo contra factum suum proprium venire potest*, but that his heire after his decease might avoide it by the intendment of this act, to the end that men should not purchase such parcell, for feare of losing the same after the death of the feoffor: but if the heire apparant had joyned with his auncester in the feoffment, or after had confirmed it, and thereby had given his assent thereunto, he or his heires should never have avoided it, whether he survived his father or no: and if the heire entred upon this statute, the alienee of part might plead that the service, whereby the land was holden, might be sufficiently done of the residue, and thereupon issue might be taken. And I have seene divers such precedents betweene this act of *Magna Charta*, and 18 E. 1.

Then came the statute of 18 E. 1. which enacteth, *quod de cætero liceat unicuique libero homini terras suas, seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita tamen quod feoffatus teneat terram illam, seu tenementum illud de capitali domino per eadem servitia, et consuetudines, per quæ feoffator suus illa prius de eo tenuit, et si partem aliquam earundem terrarum, seu tenementorum alicui vendiderit, feoffatus ille partem illam immediate teneat de domino.*

Many excellent things are enacted by this statute, and all the doubts upon this chapter of *Magna Charta* were cleered, both statutes having both one end (that is to say) for the upholding and preservation of the tenures, whereby the lands were holden; this act of 18 E. 1. being enacted *ad instantiam magnatum regni*.

1 First this statute of 18 E. 1. doth begin with a *de cætero liceat*, which proveth that before it was not lawful to alien part, unles sufficient were left, and this approveth the aforesaid common opinion, that in that case, the heire might enter, otherwise this chapter of *Magna Charta*, had been in vaine and this *de cætero liceat*, had not needed.

2 That by this statute of 18 E. 1. the prohibition and penalty by this chapter of *Magna Charta*, to avoide the state of the feoffee is taken away; *de cætero liceat, &c.*

3 The point aforesaid of the common law, that the tenant could not alien parcell to hold of the lord, is by this act of 18 E. 1. altered.

4 Another point of the common law is by this act altered, that where by the common law, he hath aliened parcell to hold of himselfe, this is taken away, and the alienee shall hold of the lord *pro particula*.

5 Where the tenant had liberty, and election by the common law

terrarum. ubi sup. Hill. 2 E. 3. coram rege wiltes. Prerog. regis, c. 6. F. N. B. 175. 14 E. 3. quare imp. 54. Br. Alienation sans licence 34. Hill. 43 Eliz. 1. 2. fol. 80, 81. Seign. Cromwells case.

18 E. 1. de quia emptores terrarum.

law to make a feoffment of the whole, to hold either of himselfe, or of the lord, now this liberty and election is taken away, for by this act the land must be immediately holden of the lord.

Registr. 268.
F.N.B. 234.

6. That the king is bound by this act, and this appeareth by the Register, that the king cannot charge the feoffee of part with the entire rent, but there lieth a writ *de onerando pro rata portione*; but the king may graunt lands to hold of himselfe, for he is not restrained by this act, for hereby no man is restrained, but he which holds over of some lord, and the king holdeth of none.

But then here riseth a question, if by this chapter of *Magna Charta*, a fine for alienation accrued to the king upon an alienation of the kings tenant in *capite*, and now this restraint (as hath been said) being taken away; how can that prerogative stand when the foundation, whereupon it is built faileth?

27 E. 2. ca. 7.
1 E. 3. ubi su-
pra.

But hereunto it is answered. 1. The restraint of *Magna Charta*, *secundum quid*, as to the avoydance of the state of the feoffee by the heire, is taken away, as hath been said, but not *simpliciter*, for in respect of the king, the fine for alienation remains due, and herewith agreeth constant and continuall usage. 2. The statute of 1 E. 3. enacteth, *que de formes de tiebz terres et tenements alien soit reasonable fine prise in le chauncery*, and though it saith (*deformes*) from henceforth, that was not, that any fine was due before, but, as hath been said, to take away the question of the forfeiture.

After this act out of the office of the remembrancer of the exchequer, writs of *quo titulo ingressus est*, to help the king to his reasonable fine, issued out of the exchequer, to know how the feoffee came to the whole, or part of the land, and of what estate, whereupon the feoffee was driven to plead to his great charge and trouble, and therefore upon conference had with the kings officers, and the judges, it was ordained, that seeing the kings tenant could not alien without licence, for if he did, he should pay a fine, that for a licence to be obtained, the king should have the third part of the value of the land, which was holden reasonable, and the feoffee should pay the same because his land was otherwise to be charged, and he rid of the trouble and charge by the writ of *quo titulo ingressus est*; and if the alienation was without licence, then a reasonable fine by the statute, was to be paid by the alienee, which they resolved to be one yeares value, which ever since constantly and continually hath been observed and paid.

45 E. 3. ca. 6.
27 E. 3. 6.

This fine was to be paid by the alienee, as hath been said, or by those that claimed by or under him, and if the fine be not paid, the land shall be seised into the kings hands; and the intent of a parliament is always intended just, and reasonable; and therefore if a disseisor of lands in *capite* make an alienation without licence; and the disseisee enter, the land shall not be seised for the fine, for the disseisee is in by a title, before the alienation, and so in other like cases. If he in the reversion levy a fine of lands holden in *capite* without licence, the lessee for life shall not be charged with the fine, because that estate was before the alienation, but yet in a *quid juris clamat*, the lessee shall not be compelled to attorne, because the court will not suffer a prejudice to the king in like manner, as if the reversion had been aliened in mortmain without the kings licence.

I have been the longer in explaining this chapter, because it seemed so obscure to some readers in former times, that they passed it over without any explanation.

CAP.

C A P. XXXIII.

OMNES patroni abbatiarum, qui habent chartas regum Angliæ de advocacione, vel antiquam tenuram, vel possessionem, habeant earum custodiam cum [vacaverint] sicut habere debent, sicut superius declaratum est, cap. 5.

ALL patrons of abbies, which have the king's charters of England of advowson, or have old tenure or possession in the same, shall have the custody of them when they fall void, as it hath been accustomed, and as it is afore declared.

(25 Ed. 3. stat. 3. c. 1.)

This statute is intended where the patron, or founder of abbeyes, or priories by special reservation, tenure or custome, ought to have the custody of the temporalities of the same, during the vacation, as many patrons and founders in times past had. But if the king be founder, he ought to have the temporalities during the vacation, of common right by his prerogative.

If the king and a common person joyn in a foundation, the king is the founder, because it is an entire thing. 44 E. 3. 24.

If a common person found an abbey, or priory, with possessions of small value, and the king after endow it with great possessions, yet the common person is founder. If a common person found a chauntry, and after the king translate it, and make it a monastery, and endow it with possessions, yet the common person is in law the founder, because he gave the first living; so if the translation be from regular to secular, *vel e contra*.

C A P. XXXIV.

NULLUS capiatur, aut imprisonetur propter appellum feminae (1), de morte alterius quam viri sui.

NO man shall be taken or imprisoned upon the appeal of a woman for the death of any other, than of her husband.

(Bro. Appeal, 5, 17, 60, 68, 104, 112. Raft. Ent. 43.)

For this word, Appeale, see the first part of the Institutes: At the common law before this statute, a woman, as well as a man might have had an appeale of death of any of her auncestors, and therefore the son of a woman shall at this day have an appeale, if he be heire at the death of the auncestor, for the son is not disabled, but the mother onely, for the statute saith, *propter appellum feminae*. Vide more of this in the first part of the Institutes.

* Fleta saith, *Femina autem de morte viri sui inter brachia sua interfecit, et non aliter poterit appellare*; and therewith agreeth the Mirror, Britton, and Bracton.

See the first part of the Institutes, sect. 500.

Glanv. lib. 14. c. 3. 15 E. 2. Cor. 385. 17 E. 4. 1. 20 H. 6. 43. Stamf. Pl. Cor. 58, 59. Bract. li. 4. fol. 143. Brit. fo. 55. Flet. 1. 1. ca. 2. & ca. 2. § 7.

33. See the first part of the Institutes, sect. 24. * Fleta ubi supra. Mirror, ca. 5. § 50 E. 3. 14. 28 E. 3. 91. 3 E. 3. Coron. 357. 20 H. 6. 46.

II. INST.

G

By

By *inter brachia* in these auncient authors, is understood the wife, which the dead had lawfully in possession at his death, for she must be his wife both of right and in possession, for in an appeale, *unques accouple in loiall matrimony*, is a good plea.

A woman at this day may have an appeale of robbery, &c. for she is not restrained thereof.

This writ of appeale of the death of her husband, is annexed to her widowhood, as her quarentine is.

If the wife of the dead marry again, her appeale is gone, albeit the second husband die within the yeare; for shee must before any appeale brought, continue *femina viri sui*, upon whose death she brings the appeale.

[69]

11 H. 4. 46.

So if she bring the appeale during her widow-hood, and take husband, the appeale shall abate, and is gone for ever.

So likewise, if in her appeale she hath judgement of death against the defendand, if after she take husband, she can never have execution of death against him.

35 H. 6. 63.

Albeit the husband be attainted of high treason, or felony, yet if he be slain, his wife shall have an appeale, for notwithstanding the attainder he was *vir suus*, but the heire cannot have an appeale, for the blood is corrupted betweene them.

(1) *Appellum femine.*] A hermaphrodite, if the male sex be predominant, shall have an appeale of death as heire, but if the female sexe doth exceed the other, no appeale doth lie for her as heire.

C A P. XXXV.

NULLUS comitatus (1) de cætero teneatur nisi de mense in mensem, et ubi major terminus esse solebat, major sit (2). Nec aliquis vicecomes, vel balivus suus faciat turnum suum per hundredum; nisi bis in anno, et non nisi in loco debito et consucto, viz. semel post Pasch', et iterum post festum S. Michaelis (3), et visus francipleg' tunc fiat ad illum terminum Sancti Michaelis sine occasione. Ita scilicet quod quilibet habeat libertates suas quas habuit, vel habere consuevit tempore regis Henrici avi nostri, vel quas postea perquisivit. Fiat autem visus de frankpleg' sic (4): videlicet, quod pax nostra teneatur, et quod tithinga teneatur integra (5), sicut esse consuevit, et quod vicecomes non querat occasiones (7), et contentus sit de eo, quod vicecomes habere consuevit (8) de visu suo

NO county court from henceforth shall be holden, but from month to month; and where greater time hath been used, there shall be greater: nor any sheriff, or his bailiff, shall keep his turn in the hundred but twice in the year; and no where but in due place, and accustomed; that is to say, once after Easter, and again after the feast of Saint Michael. And the view of frankpledge shall be likewise at the feast of Saint Michael without occasion; so that every man may have his liberties which he had, or used to have, in the time of king Henry our grandfather, or which he hath purchased since. The view of frankpledge shall be so done, that our peace may be kept; and that the tything be wholly kept as it hath been accustomed; and that the sheriff seek

no

fu faciendo, tempore H. reg. avi nostri (6).

no occasions, and that he be content with so much as the sheriff was wont to have for his view-making in the time of king Henry our grandfather.

(Fitz. Leet, 11. 8 H. 7. f. 4. 1 Roll, 201. Cro. El. 125, 2 Leon. 74. Regist. 175, 187. F.N.B. 161. 31 Ed. 3. stat. 1. c. 15.)

(1) Comitatus.] *Quod modo vocatur comitatus, olim apud Britones temporibus Romanorum in regno isto Britanniae vocabatur consulatus; et qui modo vocantur vicecomites, tunc temporis vice-consules vocabantur; ille vero dicebatur vice-consul, qui consule absente ipsius vices supplebat in iuris foro.*

Curia comitatus, in Saxon, ðcýpexemote, i. comitatus conventus.

Ejus duo sunt genera, quorum alterum hodie le countie court, alterum le tourne del viscount, olim folkmote, vulgo nuncupatur; so as many times turn' vicecomitiis is expressed under the name of curia comitatus, because it extended through the whole county: and therefore in the red book of the exchequer, amongst the laws of king H. 1. cap. 8. de generalibus placitis comitatum, it is thus contained, viz.

*Sicut antiqua fuerat institutione formatum, salutare regis imperio vera est recordatione firmatum, generalia * comitatum placita certis locis, et vicibus, et definito tempore per singulas anni provincias convenire debere, nec ullis ultra fatigationibus agitari, nisi propria regis necessitas, vel commune regni commodum scripius adjiciant. Interfint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni, praefecti, praepositi, barones, wassores, tingrevii, et ceteri terrarum domini diligenter intendentes, ne malorum impunitas, aut gravium pravitas, vel iudicum subversio solita miseros laceratione consintiant: agantur itaque primo, debita verae christianitatis iura, secundo, regis placita, postremo, causae singulorum, &c. debet enim Sherysmote, (i. the sheriffs tourne) bis; hundreda, et wapentachia, (i. the county courts) duodecies in anno congregari.*

And truly did H. 1. say, sicut antiqua fuerat institutione formatum: for these courts of the tourn, and of the county, and of the leete or view of frankpledge mentioned hereafter in this chapter were very auncient; for of the tourn you shall reade amongst the lawes of king Edw. Statutum est quod ibi (scilicet apud le folkmote) debent populi omnes, &c. convenire, et se fide et sacramento non fracto ibi in unum et simul confederare, &c. ad defendendum regnum, &c. una cum domino suo rege, et terras suas, et honores illius omni fidelitate cum eo servare, et quod illi, ut domino suo regi intra et extra regnum universum Britanniae fideles esse velint, &c. Hanc legem invenit Arthurus (qui quondam fuit inclitissimus rex Britonum) et ita consolidavit et confederavit regnum Britanniae universum semper in unum, hujus legis autoritate expulit Arthurus praedictus Saracenos et inimicos a regno, lex enim ista diu seposita fuit, donec Edgarus rex Anglorum qui fuit avus Edwardi regis, illam excitavit, et erexit in lucem et per totum regnum firmiter observari praecipit: et hujus legis autoritate rex Etbelared. subito uno et eodem die per universum regnum Danos occidit.

By the lawes of king Edward, before the conquest the first, which succeeded king Alured, it is thus enacted:

Praepositis quisque, i. vicecomes Saxonice gerefa, Anglice sheriffe, ad quartam circiter septimanam frequentem populi concionem celebrato, cuique jam dicto aequabile, litesque singulas cum dies conditi adveniant dirimito.

Inter leges R. Ed. Lamb. 129. a. b. Idem verbo Conventus.

12 H. 7. 18. Lamb. 135. Britton, ca. 27. Flet. 1. 2. ca. 36, 37. In libro rubro, in Scaccario, ca. 8.

[70]
* i. Turnorum placita.

Regis placita.
i. The pleas of the crown holden in the sheriffs tourn also.

Lamb. fol. 135. The oath of allegiance in the tourn or leet.

Inter leges Edw. regis. ante conq. 1. cap. 11. fol. 51.

Hereby it appeareth that common pleas between party and party were holden in the county court every month, which agreeth with *Magna Charta*, and other statutes and continuall usage to this day.

Inter leges Ed-
gari regis, ca. 5.
fo. 80.

And amongst the laws of king Edgar it is thus concerning the sheriffes tourn provided.

Celeberrimus ex omni satrapia bis quotannis conventus agitor, cui quidem illius diocesis episcopus, et senator interfunt, quorum alter jura divina, alter humana populum edocet; which also agreeth with *Magna Charta*, and other statutes and continuall usage.

Britton. cap. 29.
Fleta, lib. 2. cap.
45: Marlebr.
ca. 10. 31 H. 6.
Leet 11. F. N. B.
169. a.

By that which hath been said, it appeareth that the law made by king H. 1. was (after the great heat of the conquest was past) but a restitution of the auncient law of England: and forasmuch as the bishop with the sheriffe did goe in circuit twice every yeare, by every hundred within the county (which also appeareth by this chapter of *Magna Charta* in these words, *turnum suum per hundreda, &c.*) it was called tour, or tourn, which signifieth a circuit, or perambulation.

Now let us peruse the severall branches of this chapter.

(2) *Nullus comitatus de cætero teneatur nisi de mense in mensem, et ubi major terminus esse solebat, major sit.*] This (as hath been said) is an affirmance of the common law, and custome of the realme.

Comitatus.] Here *comitatus* is taken in the common sense for the county court.

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That the realme was divided into counties long before the raigne of king Alured, viz. in the time of the auncient Britons. See the first part of the Institutes, sect. 248.

2 E. 6. cap. 25.

Et ubi major terminus, &c.] This is altered by the statute of 2 E. 6. whereby it is provided that no county court shall be longer deferred, but one month from court to court, and so the said court shall be kept every month, and none otherwise.

By which act every county of England, concerning the time of the keeping of the county court is governed by one and the same law.

And there is to be accounted 28 dayes to the legall month in this case, and not according to the month of the kalender.

31 E. 3. ca. 15.

(3) *Nec aliquis vicecomes, vel balivus suus faciat turnum suum per hundredum, nisi bis in anno, et non nisi in loco debito et consueto, viz. semel post Pasch. et iterum post festum S. Michaelis.*] Where this branch saith, *semel post Pasch. &c.* The statute of 31 E. 3. explaineth it, viz. one time within the month after Easter, and another time within the month after S. Michael, and if they hold them in any other manner, then they should lose their tourn for that time, which is as much to say, as the court so holden for that time, shall be utterly void, and the sheriffe shall lose the profits thereof.

38 H. 6. fol. 7.
6 H. 7. 2.
Stamf. pl. Cor.
34.

Nisi in loco consueto.] This remaineth to this day.

Per hundreda.] How hundreds, and the courts of the hundreds first came, see hereafter in this chapter.

42 E. 3. 4. & 5.
Dier, 43 & 5.
Phil. & Mar.
151.

Et visus franciplegii tunc fiat ad illum terminum Sancti Michaelis, &c.] It hath appeared before, that of auncient time the sheriffe had two great courts, viz. the tourne, and the county court: afterwards for the ease of the people, and specially of the husbandman, that each of them might the better follow their businesse in their severall degrees, this court here spoken of, viz. view of frankpledge,

pledge, or leet was by the king divided, and derived from the tourn, and graunted to the lords to have the view of the tenants, and resiants within their mannors, &c. So as the tenants, and resiants should have the same justice, that they had before in the tourn, done unto them at their own doores without any charge or losse of time, and for that cause came the duty in many leets to the lord *de certo lete*, towards the charge of obtaining the graunt of the said leet.

So likewise, and for the same reason were hundreds, and hundred courts, divided and derived from the county courts, and this the king might doe, for the tourn and leet both are the kings courts of record: and as the king may graunt a man to have power *tendere placita* within a certain precinct, &c. before certain judges, and in a manner exempt it from the jurisdiction of his higher courts of justice, so might he doe in case of the tourne, and hundred courts: so as the courts and judges may be changed, but the lawes and customes, whereby the courts proceed, cannot be altered. And as the county court, and hundred court are of one jurisdiction, so the tourne, and leet be also of one and the same jurisdiction; for *derivativa potestas est ejusdem jurisdictionis cum primitiva*.

The style of the tourn is *curia franc. plegii domini regis tent apud L. coram vicecomite in turno suo tali die, &c.* And therefore in some books it is called the leete of the tourn. And therefore where the sheriffe stiled his court, *turn. vicecom. tent. tali die apud L. &c.* it was resolved that it was insufficient for that this word tourn is but the perambulation of the sheriffe, but by the right style of the tourn, it appeareth that the tourn and leet have but one style, and the same jurisdiction.

But for want of the knowledge of antiquity it was *obiter*, in 18 H. 6. denied that the tourn, and the leet were of one jurisdiction, and two instances are there put, viz. that the leet hath consufance of bread and ale, that is, of the assise of bread and ale, and the tourn hath not consufance thereof; and the other is, that in the leet they have authority *de presenter ceux, queux ne sont lies*, abridged by Fitzh. *a presenter ceux, que ne sont mis en le decennarie*.

To the first it is cleare, that the breach of the assise of bread and ale is presentable in the tourn, as a common nufance, and therewith agreeth constant and continuall experience, and reason proveth, that the derivative cannot have consufance of that which the primitive had not, unlesse it be given by some act of parliament; and herewith agreeth the style of the tourn, and the authority of later books.

As to the second, it is ill reported in the book it selfe; but if it be intended as Fitzh. abridgeth it, then it is cleare that in the tourn they that be not put into the decennary may be inquired of, for, as hath been often said, the style of the tourn is, *curia visus frank-pleg'*; and the derivative cannot of common right have more then the primitive.

But both of the tourn and the leete, this may be truly said,

Tempora mutantur, & nos mutamur in illis;

Quodque vera institutio istius curiæ evanuit, et velut umbra ejusdem ad huc remanet: habemus quidem senatus consultum, sed in tabulis repositum, et tanquam gladium in vagina reconditum.

But now let us return to our *Magna Charta*.

11 H. 4. 89.
13 H. 4. 9. lib.
11. fo. 45. God-freyes case.

Regula.

31 H. 6. Leet
11. 8 H. 7. 12.
6 H. 7. 2.
8 H. 7. 1.

[72]

Mirror, ca. 1. § 16.

18 H. 6. abbr.
by F. Leet. 1.

4 E. 4. 31.
22 E. 4. 21.
12 H. 7. 18.
28 H. 8. Die
13. b.

Pasch. 5. Jac.
lib. fo. 78. Bul-
leins case.
Cicero.

Mirror, ca. 1.
§ 17. & ca. 5.
§ 2.
6 H. 7. 2. & 3.

30 H. 6. Leet
11. 24 H. 8.
Br. Leet 23.
22 H. 6. 14.
8 H. 7. 4.
12 H. 7. 15.
38 H. 6. 7.
Dier, 7 Eliz.
233, 234.

Et visus de franc' plegio tunc fiat ad illum terminum Sancti Michaelis, &c.] It is to be observed that the precedent branch is, that *vicecomes non faciat turrum per hundredum nisi bis in anno*, as hath been said, viz. *semel post Pasch' et iterum post festum Sancti Michaelis*; this clause extendeth to the enquiry of felonies, common nufances and other misdeeds, the view of frankpledges, and to all things inquirable in the tourn. Now by this clause it is provided that the article of the tourn concerning the view of frankpledge, being here understood in a particular sense, shall be dealt withall by the sheriffe in his tourne but once in the year, viz. at the tourn holden after Easter, and so it hath been formerly expounded: and therefore it was well resolved in 24 H. 8. that this clause of the statute of *Magna Charta*, is to be understood of the leet of the tourn, and not of other leets, and so without question is the law holden at this day, that he that claimes a leet by charter, must hold it at the same dayes which are contained in the charter, and he that claimes it by prescription may claime to hold it once or twice every yeare, at any such dayes as shall upon reasonable warning be appointed, if the usage hath been so, so that it hath been kept at uncertain times, or else it ought to be kept at such certain dayes and times, as by prescription hath been certainly used; and the next words to this clause bee, *ita scilicet quod quilibet habeat libertates suas, quas habuit, &c.* doe explaine the meaning of this chapter, that it extended not to the leets of the subjects, but they should have their liberties, as before they had; and this also appeareth by the conclusion of this chapter, *et quod vicecomes, &c. contentus sit de eo quod vicecomes habere consuevit de visu suo faciendo*; so as it must be *visus suus*, the sheriffes view, which of necessity must be parcell of the tourn; and it is said in the Mirror, that this view of frankpledge (parcell of the tourn) should be made once every yeare.

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(4) *Fiat autem visus de franc' pleg' sic, &c.*] Here it appeareth that the view of frankpledge should have two ends. 1. *Quod pax nostra teneatur.* 2. *Quod tithingia teneatur integra.*

For the first, that the kings peace might be kept; the right institution of the view of franke pledge, and whereon the name came is to be considered, which is as followeth.

Franci plegii. i. Liberi fidejussores, free sureties or pledges; and here it is said *fiat visus de francis plegiis, ita scilicet quod pax nostra teneatur*, that is, let the view of pledges or sureties for free-men be made, so that our peace may be holden: now the institution hereof, for the keeping of the kings peace, was, that every free-man, at his age of 12 years, should in the leet (if he were in any) or in the tourne, (if he were not in any leet) take the oath of alleageance to the king, and that pledges or sureties should be found, in manner hereafter expressed, for his truth to the king, and to all his people, or else to be kept in prison: this franke pledge consisted most commonly of ten households, which the Saxons called *Theobung*, in the north parts they call them *Tenmentale*, in other places of England *Tithing*, here in this chapter *Tritthingia. i. decemvirale collegium*, whereof the masters of the nine families (who were bound) were of the Saxons called *Freoborgh*, which in some places is to this day called *free Barrowe. i. Free surety, or frankepledge*, and the master of the tenth household was by the Saxon called by divers names, viz. *Theobungmon*, to this day in the west called *Tythingman*, and *Tikenbofod* and *Freoberker. i. Capitalis plegius*, chiefe pledge: and these

Bract. lib. 3.
f. 124. int. leges
Canuti fol. 108.
19. Int. leges
Edw. regis fol.
132. cap. de fri-
borgis. Bract.
uti sup. Lamb.
verbo centuria &
decyria.

Bract. fol. 19. b.

these ten masters of families, were bound one for anothers family, that each man of their severall families should stand to the law, or if he were not forth coming, that they should answere for the injury or offence by him committed, *de eo autem qui fugam ceperit, diligenter inquirend' si fuerit in franco plegio, et decenna, tunc erit decenna in misericordia coram iustitiariis nostris, quia non habent ipsum malefactorum ad rectum.*

Hereby it appeareth, that the precinct of this frank pledge was called *decenna*, because it consisted most commonly, as hath been said, of tenne households, and every man of these severall households, for whom the pledge or surety was taken were called *decennarii*, because every particular person in the kingdome was of one *decenna* or other, which names are continued as shadowes of antiquity to this day. *Ordeine fuit ancientment, que nul ne demurraist en le realme, si ne fuit en dizain et pleuye de frank homes, appent aux vifs de viewer un fois per an' franke pledges et les pleuys, &c.*

By the due execution of this law, such peace (whereof this chapter speaketh) was univerally holden within this realme, as no injuries, homicides, robberies, thefts, riots, tumults, or other offences were committed; so as a man with a white wand might safely have ridden before the conquest, with much money about him, without any weapon throughout England; and one saith truely, *conjectura est, eaq; non lewis, haud ita multis statuiffe prisca tempora sceleribus, quippe quibus rapinae, furto, caedi, plurimisq; aliis sceleribus multa imponebantur pecuniariae, cum hiis hac nostra tempestate, nos omnibus merito capitis poenam irrogamus, &c.*

(5) *Et quod tithingia teneatur integra.*] *Tithingia* or *Tithingia* is expounded for *Theothingia*, which signifieth the frankpledge of tenne households, as hath been said, and it is notably expounded by Fleta, which there you may read at large, the sense hereof is, *quod tithingia, sive theothingia. i. decenvirale collegium teneatur integrum.* i. that no man be not within some *decenna* or other, so as he may be brought forth to stand to right if he shall offend: *olim tithingia significabat tria vel quatuor hundreda, quod autem in tithingia definiri non poterat, ferebatur in scyram.*

What persons shall come to the tourne and leete, &c. and who be exempted, see the statute of Marlebridge, and the auncient authors.

(6) *Tempore regis Henrici avi.*] Twice repeated in this chapter: vid. before cap. 15. 16.

* See the exposition of this statute Rot. claus. anno 18 H. 3. nu. 10.

(7) *Et quod vicecomes non querat occasiones, &c.*] By the common law, to avoid all extortion and grievance of the subject, no sherife, coroner, goaler, or other of the kings ministers ought to take any reward for doing of his office, but only of the king; and this appeareth by our books; and is so declared and enacted by act of * parliament in the 3 E. 1. And a penalty added to the prohibition of the common law by that act: and Fortescue, cap. 24. saith, *Viccomes jurabit super sancta Dei evangelia, inter articulos alios quod non aliquid recipiet colore, aut causa officii sui, ab aliquo alio, quam a rege.*

But after that this rule of the common law was altered, and that the sherife, coroner, goaler, and other the kings ministers, might in some case take of the subject, it is not credible what extortions, and oppressions have thereupon ensued. So dangerous a thing it is, to

Brit. ubi. sup.

Braet. l. 3. f. 124.

Brit. cap. 12.
Fleta, lib. 1. cap. 27. acc.

Mirror, cap. 1.
§. 17.

Lamb. verth.
Æstimatio capit.

Fleta, lib. 2. c. 54. § de Tithingis.

Lamb. Int. leges sanct. Edw. nu. 34. Merton, c. 10.

Marlebridg. c. 10. Mirror c. 1. § 16. Braet. lib. 3. fol. 124. Brit. 19. b. Fleta, lib. 1. c. 29. lib. 2. cap. 45.

* [74]

Mirror, c. 2. § 5. Britton, fol. 3. b. 6. a. 18. b. 37. b. Fleta, lib. 1. c. 18 § Item si officium. & lib. 2. c. 39. 27 Aff. p. 14. 42 E. 3. § 23 H. 6. cap. 10. 17. 1 H. 8. c. 7. 33 H. 8. cap. 22. 21 H. 7. fol. 17.

* W. 1. cap. 26.

See the preface
to the 4. part of
my reports.

42 E. 3. 5.
38 H. 6, 7.
6 H. 7. 2, 3.

Regist. 16. 174.
175.
F. N. B. 161. d.
Marleb. cap. 10.

shake or alter any of the rules or fundamentall points of the common law, which in truth are the maine pillars, and supporters of the fabric of the common-wealth, as elsewhere I have noted more at large, and yet not so largely, as the weight of the matter deserves.

(8) *Contentus sit de eo quod vicecomes habere consuevit, &c.*] These words are not to be intended of any reward, &c. (for the sherife by law, as hath been said, could take no reward for doing of his office) but of the profits of the court of the tourn, and such only as were accustomed in the raigne of H. 2. So they must be very auncient, for the which the sherife should (by an auncient law) pay a certaine summe *de proficuis comitatus*, and should be charged in the exchequer for this certain summe.

And it is to be observed, that if any man be grieved contrary to the purview of this act, he may, as hath been said, for his reliefe therein, have an action upon this statute, albeit no action be expressly given, which in this, and many other like cases upon the branches of *Magna Charta*, is worthy of observation.

C A P. XXXVI.

NEC liceat de cætero alicui, dare terram suam alicui domui religiosæ, ita quod illam resumat de eadem domo tenend°. Nec liceat alicui domui religiosæ terram alicujus sic accipere, quod tradat illam illi, a quo eam accepit tenend°. Si quis autem de cætero terram suam alicui domui religiosæ sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino illius feodi incurratur.

IT shall not be lawful from hence, forth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.

Mirror, c. 5, § 2. Glanv. l. 6. c. 7. (Fitz. Mortm. 1, 3. Bro. Mortm. 36. 7 Ed. 1. stat. 2. 13 Ed. 1. stat. 1. c. 32. 27 Ed. 1. stat. 2. 15 R. 2. c. 5. 23 H. 8. c. 10. 18 Ed. 3. c. 3. 1 & 2 Ph. & M. c. 8. 39 El. c. 5. 21 Jac. 1. c. 1. 13 & 14 Car. 2. c. 12. 9 Geo. 2. c. 36.)

3 E. 4. 12.

See the 1. part of
the Institutes,
sect. 133. 157.
stat. de 7 E. 1.
de religiosis.
23 H. 3. Aff.
436. Britton,
fol. 32. b. Fleta,
lib. 3. cap. 5.

[75]

This chapter is excellently abridged according to the effect thereof, and notably expounded by a parliament holden by king Edw. 1. sonne of H. 3. the words whereof are these, Of late (*viz.* anno 9 H. 3. cap. 36.) it was provided that religious men should not enter into the fees of any without licence, and will of the chiefe lords, of whom such fees been holden immediately: whereby it appeareth, that by this chapter of *Magna Charta*, a gift of lands to any religious house was prohibited, notwithstanding the religious house gave not the same back again to hold of the same house, &c. but kept the lands so given unto themselves in their own hands: and in that case, that the land should incur to the lord of the fee, consider well the words; and the interpretation is worthy observation for the interpretation of other statutes in like cases.

For

For the word Mortmain, see the first part of the Institutes.

There were two causes of making of this statute: one that the services that were due out of such fees, and which in the beginning were created for the defence of the realme, were unduly withdrawn. 2. The chiefe lords did lose their escheats, wardships, relieves, and the like; for which causes, divers provident lords at the creation of the seigniory had a clause in the deed of feoffment, *quod licitum sit donatori rem datam dare, vel vendere cui voluerit, exceptis viris religiosis, et Judæis. Vide Bracton, libro 1. fol. 13.* Many of these deeds I have seene.

But the ecclesiasticall persons (who in this were to be commended, that they had ever the best learned men in the law, that they could get, of their councell) found many wayes to creep out of this statute, viz. religious men; as abbots, priors, and other ecclesiasticall persons regular, to purchase lands holden of themselves, or take leases for long term for years, and many other devices they had to escape out of this statute: and bishops, parsons, and other ecclesiasticall persons secular took themselves to be out of this statute.

The said statute of 7 E. 1. intended to provide against these devices, in these words, *quod nullus religiosus, aut alius quicumque* (i. other whatsoever of like quality of being, a body politique, or corporate, ecclesiasticall, or lay, sole, or aggregate of many) *terras aut tenementa aliqua emere, vel vendere sub colore donationis aut termini; and to prevent all other inventions and evasions added these general words, aut ratione alterius tituli cujuscunq; terras aut tenementa ab aliquo recipere aut alio quovis modo * arte vel ingenio sibi appropriare præsumat, sub forisfactura eorundem.*

A man would have thought that this should have prevented all new devices, but they found also an evasion out of this statute, for this statute of 7 E. 1. extended but to gifts, alienations, and other conveyances made between them and others, *arte vel ingenio, &c.* and therefore they gave over them; and they pretending a title to the land (that they meant to get) brought a *præcipe qd. reddat*, against the tenant of the land, and he by consent and collusion should make default, and thereupon they should recover the land, and enter by judgement of law, *et sic fieret fraus statuto.*

When this new invention was provided for, and taken away by the statute of W. 2. yet found they out an evasion out of all these statutes, for now they would neither get any land by purchase, gift, lease, or recovery, but they caused the lands to be conveyed by feoffment, or in other manner to divers persons, and their heires, to the use of them and their successors, by reason whereof they took the profits; but this was enacted by the statute of 15 R. 2. to be mortmain within the forfeiture of the said statute of 7 E. 1.

But the foundation of all these statutes, was this chapter of *Magna Charta.*

First part of the Institutes. cap. Frankalmoine.

Bract. li. 1. fol. 13.

Fleta, lib. 3. cap. 5.

15 R. 2. cap. 5.
29 Aff. p. 17.
Br. 29 H. 8.
Mortmain, 39.

* These words are notably explained. 15 R. 2. ca. 5. 19 H. 6. 56. 41 E. 3. 16. 41 E. 3. 21. 29 H. 8. Br. Mortmain 39. 17 E. 3. 59. 21 E. 3. 46. Rot. parliam. 5 R. 2. nu. 92. Quant le terre est per convey al roy. W. 2. cap. 32. Fleta, lib. 3. cap. 5. 45 E. 3. 19.

15 R. 2. cap. 5.
8 H. 4. 26.

C A P. XXXVII.

SCUTAGIUM (1) *de cætero capiatur sicut capi consuevit tempore Henrici regis avi nostri* (2).

ESCUAGE from henceforth shall be taken like as it was wont to be in the time of king Henry our grandfather.

Fleta, lib. 2. ca. 60.

(1) *Scutagium.*] *Vide* for this the first part of the Institutes, lib. 2. cap. Escuage, sect. 95.

Tempore Henrici regis avi nostri.] Here is another reference to the reign of king Henry the second. See for this before, cap. 15. &c.

C A P. XXXVIII.

SALVÆ sint archiepiscopis, episcopis, abbatibus, prioribus, templariis, hospitalariis, comitibus, baronibus, et omnibus aliis, tam ecclesiasticis personis, quam secularibus, omnes libertates et libera consuetudines, quas prius habuerunt. Omnes autem istas consuetudines et libertates prædictas, quas concessimus in regno nostro tenend' (quantum ad nos pertinent) erga nos et hæred' nostros observemus, et omnes de regno nostro, tam clerici quam laici observent (quantum ad se pertinent) erga suos. Pro hac autem donatione et concessione libertatum istarum, et aliarum libertatum contentarum in charta nostra de libertatibus forestæ, archiepiscopi, episcopi, abbates, priores, comites, barones, milites, liberi tenentes, et omnes de regno nostro dederunt nobis quinto-decimam partem omnium mobilium suorum. (*vide stat. 7. anno 25 E. 3*) Concessimus etiam eisdem pro nobis et hæredibus nostris, quod nec nos, nec hæredes nostri, aliquid perquiremus, per quod libertates in hac charta contentæ infringantur vel infringuntur. Et si ab aliquo contra hoc aliquid perquisit' fuerit, nihi! valeat,
et

RESERVING to all archbishops, bishops, abbots, priors, templars, hospitallers, earls, barons, and all persons, as well spiritual as temporal, all their free liberties and free customs, which they have had in time passed. And all these customs and liberties aforesaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we shall observe; and all men of this our realm, as well spiritual as temporal (as much as in them is) shall observe the same against all persons in like wise. And for this our gift and grant of these liberties, and of other contained in our charter of liberties of our forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and other our subjects, have given unto us the fifteenth part of all their moveables. And we have granted unto them on the other part, that neither we, nor our heirs, shall procure or do any thing whereby the liberties in this charter contained shall be infringed or broken; and if any thing be procured by any person contrary to the

et pro nullo habeatur. Hiis testibus Bonifacio Cantuar' archiep', E. Londonensi episcopo, et aliis. Datum apud Westm' decimo die Februarii, anno regni nostri nono.

the premisses, it shall be had of no force nor effect. These being witnesses; lord B. archbishop of Canterbury, E. bishop of London, and others.

This chapter doth consist of six parts.

First it is enacted, that all the liberties, and free-customes, which any archbishop, bishop, abbot, prior, templar, hospitalier, earle, baron, or any person either ecclesiasticall or secular, have had, be safe, that is, whole without prejudice unto them, for the words be *salvæ sint omnibus archiepiscopis, &c. omnes libertates, &c.* all the liberties, &c. be safe to all archbishops, &c. so as this is no saving to them, but in effect, an act that they should enjoy them: for regularly a saving in an act of parliament enlargeth not, nor extendeth to any new thing, but preserveth a right or interest, that is former to things contained in the act, which by the words of the act might have been given away. But this clause doth enlarge, and extendeth to all other liberties, and free customes, which any subject ecclesiasticall, or temporall ought to have; and therefore the English translation, both in this and many other places of this great charter, is very vicious. But it is principally to be observed, that here is not any saving at all for the king, his heires, or successors, to the end that the king, his heirs, and successors against all pretences of evasions, should be bound by all the branches of both these charters.

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The second is, that all the customes, and liberties, which the king had graunted to be holden within his realme, for him and his heires, the king himselfe and his heires, as much as appertained to him or them, should observe and keepe.

The third is, that all the men of this realme, as well of the clergy as of the laity, the said customes and liberties for themselves and their heirs, as much as to them appertained, should observe and keepe.

This is the chiefe felicity of a kingdome, when good lawes are reciprocally of prince and people (as is here undertaken) duly observed.

The fourth is, that for this gift and graunt by the king, of the liberties contained in this great charter, and of others contained in the kings charter of liberties of the forest, the archbishops, bishops, abbots, priors, earles, barons, knights, free-holders, and other the kings subjects, citizens, and burgeses, (assembled in parliament) gave unto the king one fifteenth; which proveth, that as the fifteenth was graunted by parliament, so was this great charter also graunted by authority of the same; but since this time the manner of the fifteenth is altered; for now the fifteenth, which is also called the Task, is not originally set upon the polles, as at this time it was, but now the fifteenth is certainly rated upon every towne. And this was by vertue of the kings commissions into every county of England in 8 E. 3. taxations were made of all the cities, boroughes, and towns in England, and recorded in the exchequer, and that rate was at that time the fifteenth part of the value of every town, and therefore retaineth the name of the fifteenth still.

And after the fifteenth is graunted by parliament, then the inhabitants

Hil. 3 Jacobi.
lib. 8. The Princess case.

Rot. pat. 6 E. 3.
2. part. nu. 26.

bitants rate themselves for payment thereof, and if one towne be joyned with another in the rate of the totall, and subdivided on each a certain rate in that commission, and the one is rated too low, and the other too high, there lieth a writ called, *ad æqualiter taxand*⁹ to be taken out of the exchequer to rate the townes equally. The subsidie is uncertaine, because it is set upon the person, in respect of his lands, or goods, which commonly doe ebb and flow.

The fift is, that the king did graunt for him, and his heires, that neither he, nor his heires, shall seeke out any thing, whereby the liberties in this charter contained may be broken, or weakened: and if by any man against this charter any thing should be fought out, it should be of no value, and holden for nought. And all these doe evidently appeare in this chapter.

The sixt and last is *hiis testibus*.

It is true, that of auncient time nothing passed from the king of franchises, liberties, priviledges, mannors, lands, tenements, and hereditaments of any estate of inheritance, but it was by the advice of his counsell exprested under *hiis testibus*, as it was then, and continues to this day in the creation of any to any degree of nobility, for thereto *hiis testibus* is still used.

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This conclusion of the kings graunts with *hiis testibus* was used by king H. 3. and his progenitors kings of this realme before him, and by his son E. 1. and by E. 2. and E. 3. after him: afterwards, in the beginning of the raigne of R. 2. I finde the clause of *hiis testibus* was left out, and in stead thereof came in *teste me ipso* in this manner, *in cujus rei testimonium has literas nostras fieri fecimus patentes: teste me ipso*. which since by all his successors kings, and queens of this realme (except in creations) hath been used.

Those that had *hiis testibus*, were called *chartæ*, as this charter is called *Magna Charta*, and so is *charta de foresta*, &c. and those other that be *teste me ipso*, are called letters patents, being so named in the clause of *in cujus rei testimonium has literas nostras fieri fecimus patentes*.

See the first part
of the In-
strutes, sect. 1.

And this was the auncient forme also of the deeds of subjects, concluding with *hiis testibus*, which continued untill, and in the raigne of H. 8. but now is wholly omitted, and now the witnesses are subscribed under the deed, or endorsed thereupon.

Now upon this occasion to treat how these clauses, *datum per manum nostram, per manum cancellarii nostri, per ipsum custodem, et concilium, &c.* entred in, and went out: when these clauses, *de gratia speciali*, and *ex certa scientia, et mero motu* began, which continue to this day) and the cause and reason of the inserting of the same; and when and wherefore these clauses were subscribed under the letters patents, *per ipsum regem, per breve de privato sigillo, autoritate parliamenti, &c.* came in, (which still doe continue) would aske a severall treatise of it selfe, and not pertinent to our purpose for the understanding of this charter of *Magna Charta*, and therefore purposely I speake not of them.

Here be witnesses to this great charter, a great number of reverend, and honourable personages, in all 63. of which there were of the clergy 31. whereof there were 12. bishops, and 19 abbots, and Hugh de Burgo chiefe justice, and 31 earles and barons, as hath been said before.

Besides, it was established by authority of parliament, which was holden at Westminster, in forme of a charter, as many others have been

Hil. 3 Jac. in
Cancellaria. The
Princes case.
Lib. 8. fol. 19.

been, for which, as hath been said likewise, by parliament the lords and commons gave a fifteenth. Of acts of parliament in form of a charter, you may read at large in the princes case, and therefore need not to be recited.

STATUTUM de MERTON.

[79]

EDITUM anno 20. H. III.

Bracton, li. 2. c.
96, saith it was
in anno 18 H. 3.

IT is called the statute of Merton, because the parliament was holden at the monastery of the canons regular of Merton, seven miles distant from the city of London, which monastery was founded by Gislebert a noble Norman, that came in with the Conqueror. And this is that monastery of Merton, the prior whereof had a great case in law, which long depended between him and the prior of Bingham.

18 E. 4. 22.
19 E. 4. 2. 7.
20 E. 4. 16.
21 E. 4. 60.

PROVISUM est in curia domini regis apud Merton, die Mercurii, in crastino Sancti Vincentii, anno regni regis Henrici filii regis Johannis vicesimo, coram W. Cantuariensi archiepiscopo, et coepiscopis suffraganeis suis (1), et coram maiore parte comitum et baronum Angliæ ibidem existentium, pro coronatione ipsius domini regis (2) et Elianoræ reginæ (3), pro qua omnes vocati fuerunt, cum tractatum esset de communi utilitate regni super articulis subscriptis, ita provisum fuit et concessum, tam à prædictis archiepiscopis, episcopis, comitibus, baronibus, quam ab ipso rege, et aliis.

IT was provided in the court of our lord the king, holden at Merton on Wednesday the morrow after the feast of St. Vincent, the 20th year of the reign of king Henry the son of king John, before William archbishop of Canterbury, and other his bishops and suffragans, and before the greater part of the earls and barons of England, there being assembled for the coronation of the said king, and Helianor the queen, about which they were all called, where it was treated for the commonwealth of the realm upon the articles underwritten, thus it was provided and granted, as well of the foresaid archbishops, bishops, earls, and barons, as of the king himself and others.

(1) *Coram Cant. archiepiscopo, et coepiscopis suffraganeis suis.*] Suffraganeus properly is a vicegerent of a bishop, instituted to aid and assist him in his spirituall office, and is so called a *suffragani*: of these you may read in the statutes of 26 H. 8. 1 & 2 Phil. & Mariæ. 1 Eliz. And where some copies have *coram Cantuar' archiepiscopo, et coepiscopis et suffraganeis*; this latter conjunction (&) is more then ought to be; for *suffraganeis suis* must referre to *coepiscopis*, that is that

26 H. 8. cap. 14.
1 & 2 Ph. and
Mar. ca. 2.
1 Eliz. ca. 1.

See the first part
of the Institutes,
Cap. Frankal-
moigne.

that the bishops should aide and assist the archbishop with their suffrages: for other suffragans, which were vicegerents of bishops, never had voyce in parliament, because they held not *per baroniam*, as all bishops doe, and many abbots and priors, as hath beene said, did, in respect whereof they were lords of parliament.

Pro coronatione ipsius domini regis.] The king was formerly crowned at Gloucester on the 18 of October, in the beginning of the first yeare of his raigne, then being about nine yeares old: and here it appeareth that in the twentieth yeare of his raigne, he was crowned again, then being about 29 yeares old, twice crowned as king Henry the second, and king John before him had been, and as king R. 2. after him was.

Et Elianoræ reginæ.] This Elianor was daughter, and one of the heires of Raymond Berengary earle of Province; she was sister to the earle of Province, and to Boniface, archbishop of Canterbury, and she was crowned at Westminster.

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She survived the king, and of a crowned queen became a professed nun in Ambresbury, and died a nun there, in the nineteenth yeare of her widowhood.

The statutes enacted at this parliament are divided into eleven chapters.

C A P. I.

DE viduis primo, quæ post mortem virorum suorum expelluntur de dotibus suis, et dotes suas, vel quarentenam suam habere non possunt sine placito, videlicet, quod quicumque deforcaverit eis dotes suas, vel quarentenam suam, de tenementis quibus viri sui obierunt seisciti, et ipsæ viduæ postea per placitum recuperaverint, si ipsi deforc de injusto deforcamento convicti fuerint, reddant eisdem viduis damna sua, scilicet valorem totius dotis eis contingentis, à tempore mortis virorum suorum, usque ad diem quo ipsæ viduæ per judicium curiæ seisinam suam inde recuperaverint. Et nihilominus ipsi deforcatores sint in misericordia domini regis.

FIRST, of widows which after the death of their husbands are deforced of their dowers, and cannot have their dowers or quarentine without plea, whosoever deforce them of their dowers or quarentine of the lands, whereof their husbands died seised, and that the same widows after shall recover by plea; they that be convict of such wrongful deforcement shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging from the time of the death of their husbands unto the day that the said widows, by judgement of our court, have recovered seisin of their dower, &c. and the deforcers nevertheless shall be amerced at the king's pleasure.

(Dyer, 284. pl. 33. 4 Rep. 30. 14 H. 8. 25. 38 Ed. 3. 13. 11 H. 4. 39. Fitz. Dower. 24. 46. 59. 73. Fitz. Damage, 10. 83. 119. 3 Bulstr. 278. V. N. B. fo. 7. Rast. Ent. 22. 1 Inst. 32. b. 9 H. 3. c. 7.)

First part of the
Institutes, sect.
36.

This chapter is explained in the first part of the Institutes, in all the points thereof, which you may see there at large; whereunto you may adde (upon this word *recuperaverint*) a case in 9 E. 2. that in

in a writ of dower, the tenant plead that the husband is alive, &c. and the triall awarded by proofes, and a day therefore given, &c. at which day the demandant came with her proofes, and the tenant made default, the demandant had judgement to recover, but if the demandant had not had her proofes there, then she should have had but a *petit cape*.

Hil. 9. E. 2. fo. 62. b. in libro meo, un fem. &c.

CAP. II.

ITEM omnes viduæ (1) de cætero possint legare (2) blada (3) sua de terra sua, tam de dotibus suis, quam de aliis terris, et tenementis suis (4); salvois (5) consuetudinibus, et servitiis dominorum de feodo, quæ de dotibus, et aliis tenementis suis debentur.

ALSO from henceforth widows may bequeath the crop of their ground, as well of their dowers, as of other their lands and tenements, saving to the lords of the fee, all such services as be due for their dowers and other tenements.

(Kel. 125. Fitz. Bar. 149. 294.)

Before the making of this statute, it was a question, whether tenant in dower might devise the corn, which she had sown, or whether he in the reversion should have them. Some held that she could not devise them; or if she devised them not, that her executors should not have them, but he in the reversion, for that her estate was freely created by act in law; and as she when her dower was assigned to her, should have the land sown, or unsown for her dower, so at the time of her death, he in the reversion should have the land sown, or unsown. And of this opinion is Braſton who saith, *antiquitus solet observari, quod sicut uxor dotem suam recipit post mortem viri sui cultam sive incultam, ita post mortem uxoris solet restitui hæredi culta seu inculta, quia de bladis et fructibus a tenemento non separatis non habuit uxor testamenti factionem, sed nova superveniente gratia, et provisione, sicut patet de provisione apud Merton.*

Braſton, lib. 2. fol. 96.

And true it is, that if the husband sow the ground and die, the property of the corne is in the executors, but subject to this condition, that if the heire assigne unto her the land sown for her dower, she shall have the corne, for she shall be in *de optima possessione viri*, above the title of the executor.

15. El. Dier. 316.

And Fleta saith, *vidua per statutum de Merton poterit disponere de rebus suis, et fructibus in dote sua existentibus, sive separati sint a solo, sive non, quod quidem olim facere non potuit.*

Fleta, lib. 2. c. 50.

And they that held this opinion, relied much upon these words, *de cætero*, which imply, as they say, a new law. Now others held the contrary, and that, for advancement of tillage, and encouragement thereunto, which is so profitable for the commonwealth, and by reason of the incertainty of her estate for life they held opinion, that the executors or administrators of the wife should have, or she her selfe by her will might dispose them, as well as any other tenant for life might doe, and they vouch authority before this statute in 4 H. 3. where it is said, note that tenant in dower may devise her corne growing upon the land at the time of her death. Now to cleare this doubt, was this statute made, and *de cætero* may as well

4 H. 3. devise
26. 19 E. 3.
bar. 249. 12 H.
7. 25. Pasch.
38. El. lib. 5.
10. 85.
be

be applied to the clearing of a doubt from thenceforth, as for making of a new law, and so of necessity it must be taken in this chapter for such lands and tenements, as the widow hath of inheritance, &c. *quam de aliis terris et tenementis suis.*

Regula.

Regula.

1 part of the
Institutes, sect.
51. Customier
de Norm. cap.
102.

Hil. 44. El. lib.
5. fol. 116.
Oland's case.

(1) *Omnes viduæ, &c.] Qui omne dicit, nihil excludit: Generale dictum generaliter est intelligendum.*

And therefore where there are five kinds of dowers, *viz.* dower at the common law: dower by the custome: dower *ad ostium ecclesiæ*: dower *ex assensu patris*: and dower *de la plus beale*: this chapter doth extend to them all. But if the wife be by custome endowed *durante viduitate sua*, and she sowe the ground with corne, and after take husband, hee in the reversion shall have the corne, because though her estate was uncertaine, yet she hath determined it by her owne act.

(2) *Legare.]* This word is appropriated to a last will, and signifieth to bequeath goods, chattels, and in some cases lands and tenements. *Legatum a lege dicitur, quia lege tenetur ille, cui interest perimplere.*

Braeton, lib. 4.
235.
Kelw. 125.

(3) *Blada* signifieth corne or graine while it groweth: It properly signifieth corne or graine while it is *in herba, dum seges in herba*: but it is taken for all manner of corne or graine, or things annuall comming by the industry of man, as hemp, flax, &c.

And of this word *blada*, an ingrosser of corne or graine is called *bladier*, but this word *blada* extendeth not by this act to grasse, or to any thing that groweth *suapte natura*, albeit it groweth by sowing of hay-feed, or the like.

(4) *Quam de aliis terris et tenementis suis.]* This is manifestly in affirmance of the common law, and extendeth to the lands, which she hath in franck-mariage, or of any other estate of inheritance, the corne or graine growing thereupon shee may lawfully dispose.

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(5) *Salvis, &c.]* Here is a saving to the lords, of whom the lands in dower, or other lands been holden, such customes and services, as are due unto them, so as they shall not be barred, or prejudiced by this act for or concerning such customes, and services, as they had before, but they shall be saved to them, as if this statute had not been made: for that is the nature of a saving, as hath been said, to save a former right, and to create no new, and by this saving the lord may distreine the corne after it be reaped and put into a cart, for his rents and services, but the corne in sheaves cannot be distreined.

7 H. 7. 10.
Kelw. 125.

See the first part of the Institutes, sect. 68.

C A P. III.

SI quis fuerit disseisitus de libero tenemento suo (1), et coram justic' itinerantibus seisinam suam recuperavit (2), per assisam novæ disseisinæ (3), vel per recognitionem (4) eorum qui fecerint disseisinam: et ipse disseisitus
per

ALSO if any be disseised of their freehold, and before the justices in eyre have recovered seisin by assise of novel disseisin, or by confession of them which did the disseisin, and the disseisee hath had seisin delivered

per vic' seisinam suam habuerit (5), si iidem disseisitores postea, post iter iustic', vel infra de eodem tenement' iterum eundem conquerentem disseisiverint (6), et inde convicti fuerint (7), statim capiantur, et in prisona domini regis detineantur, quousque per dominum regem per redemptionem, vel aliquo alio modo deliberentur (8). Vide Marl. cap. 8. Et hæc est forma qualiter tales convicti puniri debeant, videlicet, cum conquerentes ad curiam veniant, habeant breve domini regis vic' directum, in quo contineatur eorū narratio de disseisina facta super disseisinā. Et ideo mandetur vic. quod assumptis secū custodibus placitorū (9) coronæ domini regis, et aliis legalibus militibus in propria persona sua accedat ad tenementū illud, vel ad pasturā illā de quibus facta fuerit querela, et corū eis per primos juratores (10), et per alios vicinos, et legales homines de vicineto illo, diligentem inde faciat inquisitionē. Et si ipsū iterū invenerint disseisitū (sicut prædictū est) tunc faciat secundū provisionē prædictā, sin autem, tunc sit conquerens in misericordia domini regis, et alius quietus recedat. Nec debet vic' (sine speciali recepto domini regis) huiusmodi loquelā proseguī. Eodē modo fiat de illis, qui seisinā recuperaverint per assisā mortis antecessoris, et similiter de omnibus terris et tenementis recuperatis per jurat' (11) in curia domini regis, si postea disseisiti fuerint a prioribus deforciatoribus, versus quos recuperaverint per jurat' quoquomodo. Vide W. 2. cap. 26.

delivered by the sheriff, if the same disseisors, after the circuit of the justices, or in the mean time, have disseised the same plaintiff of the same freehold, and thereof be convict, they shall be forthwith taken and committed, and kept in the king's prison, until the king hath discharged them by fine, or by some other mean. And this is the form how such convict persons shall be punished; when the plaintiffs come into the court of our lord the king, they shall have the king's writ directed to the sheriff, in which must be contained the plaint of disseisin framed upon the disseisin. And then it shall be commanded to the sheriff, that he, taking with him the keepers of the pleas of the king's crown, and other lawful knights, in his proper person, shall go unto the land or pasture, whereof the plaint hath been made, and that he make before them, by the first jurors, and other neighbours and lawful men, diligent inquisition thereof; and if they find him disseised again (as before is said) then let him do according to the provision aforementioned; but if it be found otherwise, the plaintiff shall be amerced, and the other shall go quit; neither shall the sheriff execute any such plaint without special commandment of the king. In the same manner shall be done to them that have recovered their seisin by assise of mortdauncestors; and so shall it be of all lands and tenements recovered in the king's court by enquests, if they be disseised after by the first deforceors, against whom they have recovered any wife by enquest.

See the statute of Marlbridge, c. 8. W. 2. cap. 26. See the first part of the Institutes, 233. (18 H. 8. 1. 11 H. 4. 6. 7 H. 7. 4. Fitz. Redisseisin, 6, 8, 9. 1 Inst. 154. a. Hob. 96. 2 Baldr. 93. 52 H. 3. c. 8. 13 Ed. 1. stat. 1. c. 25, 26. Mirror, 317. Raft. Ent. 548.)

(1) *De libero tenemento suo, &c.*] That is, of land, rent, common, or such like, whereof if a man be disseised he may have an assise *de novel disseisin*.

By this chapter the writs of redisseisin and *post disseisin*, are given for the causes hereafter expressed, which lay not at

II. INST

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the common law, and both these writs are vicountels, and not retournable, but the sheriffes shall hold the plea and give the judgement.

23 Aff. p. 7.
30 Aff. Pl. 35.
Bract. li. 4. fo.
236; 237.

Regula.

F. N. B. 189. d.
23 Aff. tit. redif-
feisin 3. 30. aff.
35.

14 E. 3. rediffei-
sin 8. 14 E. 2.
ibid. 9.

See the first part
of the Institutes,
sect. 234.

W. 2. cap. 26.
Fleta, li. 4. c. 29.

See the first part
of the Institutes.
ubi supra,
F. N. B. 188.
Bract. lib. 2. fol.
294, 295.

53 E. 3. rediff. 7.
40 Aff. 23.

Mirror, cap. 5.
§ 2.
Regist. 206.
Marleb. ca. 8.
W. 2. ca. 26.
Bracton, lib. 4.
fol. 236. b.
Fleta, lib. 4.
cap. 29.
Brit. fol. 246.

West. 2. c. 3.
7 E. 4. 23.
F. N. B. 126.

[84]

Regula.
Regula.

(2) *Et coram iustic' itinerantibus seisinam suam recuperaverit.*] Here justices in eyre are named, but for example, and because assises were taken most commonly before them, for though the assise be taken in the king's bench, or court of common pleas, or before justices of assise, yet is it within this statute: for though the words be speciall, yet the reason of the law is general; *et quando lex est specialis, ratio autem generalis, generaliter lex est intelligenda.*

(3) *Per assisam novæ disseisinæ.*] This branch extends not to an assise of mordauncester, or darrein presentment, or of *utrum*; but if a man recover in a writ of redisseisin, upon that recovery he shall have a redisseisin, and the like, as often as he is redisseised.

Upon a plaint in the nature of a fresh force, according to the custome of a city, or borough, and a recovery thereupon had, a redisseisin doth not lie, for no redisseisin doth lie, but where the first plea began by writ.

(4) *Per assisam novæ disseisinæ, vel per recognitionem.*] That is to say, by the assise, *i.* the verdict of the recognitors of the assise, or by confession of the disseisor, &c. and yet a redisseisin doth lie upon a recovery in an assise, upon the pleading of a record, and failer of it, or upon a demurrer, or by default, or the like; and so it is explained by a later statute.

(5) *Per vicecomitem seisinam suam habuerit.*] And so it is, if the plaintife in the assise doth enter and execute the recovery by entrie.

(6) *Iidem disseisitores postea, &c. de eodem tenemento iterum eundem conquerentem disseisiverunt.*] For the exposition hereof see the first part of the Institutes, sect. 233.

Et inde convicti fuerint.] For in the writ of redisseisin the tenant may plead to the writ as joyntancy, or the like; or in barre, as a release, or the like; or give it in evidence.

(8) *Statim capiuntur et in prisona regis detineantur quousque per dominum regem, per redemptionem, vel alio modo deliberentur.*] And Bracton hereupon saith this, *Talis quidem qui ita convictus fuerit, dupliciter delinquit contra regem, quia facit disseisinam, et roberiam contra pacem suam, et etiam ausu temerario irrita ea quæ in cur' domini regis rite acta sunt: et propter duplex delictum merito sustineri debet pœnam duplicatam.*

And Britton speaking of a redisseisin, *Pur ceo que il desuy de recover' per judgement chofe, que il ad conquise per sa proper force in despisant la ley.*

And this reason holdeth in other cases, as after a judgement in an admeasurement of pasture, if there be a surcharge by the party who was admeasured, a writ *de secunda superoneratione* doth lie, and the like.

And it is to be noted, that wheresoever a man did recover the seisin or possession of the land, and the tenant or defendant did after disseise or eject him, this was a contempt at the common law, because it is done against the judgement of the court, and in despite of the law, for the which the court may commit him, for *interest reipublicæ, ut judicia rata sint: et ea quæ in curia nostra rite acta sunt debite executioni demandari debent.*

(9) *Assumptis*

(9) *Assumptis secum custodibus placitorum.*] This is spoken in the plurall number, therefore where there are two or more coroners, he ought to take at least two, but where there is but one, if he take him, it is sufficient within the meaning of this statute: though regularly the plurall number is not satisfied with one.

23 Aff. p. 7.
F. N. B. 189.

(10) *Per primos juratores et alios.*] This must be understood where there were *juratores* in the assise; for if there were none, then it must be tried onely *per alios*: as if the disseisor plead a record, and fail of it, or if he plead a bar, and confesse an immediate ouster, upon which the plaintife doth demur, and judgement is given for the plaintife, and after the plaintife is redisseised, the plaintife shall have a redisseisin, and it shall be tried onely *per alios*, because there were no jurors at all in the former assise; for the statute, (albeit it be penal) shall not be so literally expounded, that if it cannot be tried *per primos juratores*, that it shall not be tried at all, for *verba intelligi debent cum effectu*. But where there were any jurors, it shall be tried by them and others, and where there were none, then by others alone; but if there were jurors in the assise, and they all die, and after he which recovered is redisseised, there (by the act of God) the redisseisin faileth. And so it is, if all the jurors be dead saving one, because the words of the statute be, *per primos juratores, et alios*: and so note a diversity where there were never any *juratores* at all, for there the statute could by no possibility have wrought, but upon others onely, but where there were once *juratores*, and the party neglecteth his time, and by the act of God they faile, there the redisseisin failes, because it cannot be tried *per primos juratores*, (which sometimes were in *esse*) *et alios*, as the statute speaketh.

Regula.

8 H. 5. 1.
F. N. B. 189. b.

(11) *Eodem modo fiat de illis, qui seisinam recuperaverunt per assisam mortis antecessoris, et similiter de omnibus terris et tenementis recuperatis per juratam, &c.*] Here is the *post disseisin* given, where the recovery in a mordaunc', or in any other reall action is by verdict, and in this case the recoveror shall have a *post disseisin* against the former tenant being deforceour, that disseised him after the recovery; but if the recovery be by reddition or default, &c. he shall have a *post disseisin* upon the statute of W. 2. cap. 26. *Nota*, here *eodem modo* are words of great operation, for they imply, that there must be *idem conquerens de eodem tenemento, et idem tenens*, against whom the recovery was had after the same manner, as is before said in case of a redisseisin.

Post disseisin.

Marlebr. c. 8.
W. 2. ca. 26.
F. N. B. 190.
Regist. 206. b.

CAP. IV.

* [85]

ITEM quia multi magnates Angliæ, qui feoffaverunt milites et alios libere tenentes (2) suos de parvis tenementis in magnis maneriis suis, questii fuerunt, quod commodum suum facere non potuerunt (1) de residuo maneriorum (3) suorum*, sicut de vastis, boscis, et pasturis communibus, cum ipsi feoffati habeant

ALSO because many great men of England (which have infeoffed knights and their freeholders of small tenements in their great manors) have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the same feoffees have sufficient

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habeant sufficientem pasturam, quantum pertinet ad tenementa sua; ita provisum est, et concessum, quod quicunque huiusmodi scoffati assise in novæ disseisinæ deferant de communia pasturæ suæ, et coram iusticiis recogniti fuerit (7), quod tantam pasturam habeant, quantum sufficit ad tenementa sua, et quod habeant liberū ingressum (4), et egressum, de liberis tenementis suis, usque ad pasturam suam: tunc inde sint contenti, et illi de quibus conquesti fuerint recedant quieti (6), de hoc quod commodū suum de terris, vastis, boscis, et pasturis fecerint (5). Si autem dixerint, quod sufficientem pasturā non habeant, vel sufficientem ingressum, vel egressum, quantum pertinet ad tenementa sua: tunc inquiritur veritas per assisam. Et si per assisam recognitum fuerit (8), quod per eosdem deforciatores, in aliqua fuerit impeditus eorum ingressus, vel egressus, vel quod non habeant sufficientem pasturā, et sufficientem ingressum, et egressum, sicut prædictum est: tunc recuperent seisinam suā, per visum juratorum, ita quod per discretionem et sacramentum eorum habeant conquærentes sufficientem pasturam, et sufficientem ingressum et egressum in forma prædicta, et disseisitores sint in misericordia domini regis, et dampna reddant, sicut reddi solent ante provisionē istā. Si autē recognitū fuerit per assisam, quod querentes sufficientem habeant pasturam, cum libero et sufficienti ingressu et egressu, sicut prædictum est: tunc licite & libere faciant dom' commodum suum de residuo, et recedant de ill' assisa quieti. West. 2. cap. 48.

sufficient pasture, as much as belongeth to their tenements; it is provided and granted, That whenever such scoffees do bring an assise of novel disseisin for their common of pasture, and it is knowledged before the justicers, that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenement unto the pasture, then let them be contented therewith; and they on whom it was complained shall go quit of as much as they have made their profit of their lands, wastes, woods, and pastures; and if they alledge that they have not sufficient pasture, or sufficient ingress and egress according to their hold, then let the truth be inquired by assise; and if it be found by the assise, that the same deforceors have disturbed them of their ingress and egress, or that they had not sufficient pasture (as before is said) then shall they recover their seisin by view of the inquest: so that by their discretion and oath the plaintiffs shall have sufficient pasture, and sufficient ingress and egress in form aforesaid; and the disseisors shall be amerced, and shall yield damages, as they were wont before this provision. And if it be certified by the assise, that the plaintiffs have sufficient pasture, with ingress and egress, as before is said, let the other make their profit of the residue, and go quit of that assise.

Mirror, cap. 5. § 2. Bract. li. 4. fol. 222. Britton, cap. 58. Fleta, li. 4. ca. 20. (1 Roll. 365. 8 Ed. 3. 39. 7 Ed. 3. 67. Mirror, 318. Enforced by 3 & 4 Ed. 6. c. 3. 13 Ed. 1. stat. 1. c. 46. 2 Vern. 290. 322.)

(1) *Quod commodum suum facere non potuerunt.*] Hereby it appeareth, that the lord could not approve by the order of the common law, because the common issued out of the whole waste, and of every part thereof, and yet see Tr. 6 H. 3. where the lord approved two acres, and left sufficient, the tenant brought an assise, and the speciall matter being found, the plaintiffe retraxit se.

(2) *Libere*

Tr. 6 H. 3. tit. Common 26.

(2) *Libere tenentes.*] The purview of this statute extends onely for the lord to make an approvement against his tenant, and not against any stranger, nor where the lord had common appendant in the tenancy, as he may have; but the statute of W. 2. provideth, *De cætero quod statutum de Merton, provisum inter dominos et tenentes suos locum habeat de cætero inter dominos vastorum boscorum, et pasturarum, et vicinos, &c.*

(3) *De residuo maneriorum.*] By this recital a point of the ancient common law appeareth, that when a lord of a mannor (wherein was great * waste grounds) did enfeoffe others of some parcells of arable land, the feoffees *ad manutened. servitium socæ*, should have common in the said waists of the lord for two causes. 1. As incident to the feoffement, for the feoffee could not plough, and manure his ground without beasts, and they could not bee sustained without pasture, and by consequence the tenant should have common in the waistes of the lord for his beasts, which doe plough and manure his tenancy, as appendant to his tenancy, and this was the beginning of common appendant. The second reason was for maintenance and advancement of agriculture, and tillage, which was much favoured in law; like as when a man gives the land to a parson and his successors, whereupon a church is built for the service of God, to hold of him in *frankalmoigne*, the land is holden, and by consequent, and operation of law, the advowson, which the law doth give to the founder, that is, the giver of the land, is also holden, for that the advowson doth in a manner adhere to the church, and as the tenant had made a feoffement before the statute of *quia emptores terrarum*, to hold of himselfe by fealty, and xij. d. this mesnalty by operation of law had been holden of the lord paramount.

(4) *Tantum pasturam habeant, quantum sufficit ad tenementa sua, et quod habeant liberum ingressum.*] The lord may approve against a tenant that hath * common of pasture appendant, but if the lord graunt common of pasture within his waists, there is no approvement by this act against a common in grosse, for the words of the statute be *quantum pertinet ad tenementa sua, &c.*

And so was the law taken and adjudged soon after the making of this act, and latter authorities agree with the same; and albeit the common appendant be without a certain number, as to have sufficient pasture for beasts, *quantum pertinet ad tenementa sua*, which may be reduced to a certainty, for, *id certum est quod certum reddi potest*, and therefore this act doth extend to it. And the writ of admeasurement of pasture doth lie only for and against such commoners, as have common appendant, for the words of the writ be, *et ad ipsos pertinet habendum secundum liberum tenementum suum, &c.* so as common appendant, be it certain or incertain, is within this statute; and so is common appurtenant certaine or incertaine, for *pertinet* extendeth as well to common appurtenant as appendant.

Bracton treating of this chapter, saith, *imprimis videndum est qualiter constitutio illa sit intelligenda, ne male intellecta trahat utentes ad abusum*: and then expoundeth the same in this manner: 1. *Si sit alienus (et non proprie tenens) non ei imponit legem constitutio.*

2. *Si fuer' liberi tenentes proprii, tunc refert qualiter fuer' feoffati, &c. utrum feoffati fuer' large scilicet p. rotu, et ubiq;, et in omnibus locis, et ad omnimoda averia, et sine numero, &c.* So as by his opi-

W. 2. ca. 46.
Bract. lib. 4.
fol. 228.
Fleta, lib. 4. ca.
20.
18 Aff. p. 4.
18 E. 3. 43.
19 E. 3. tit. Aff.
18 Aff. p. 4.
F. N. B. 179. c.
W. 2. ca. 46.
18 Aff. p. 4.
18 E. 3. 43. and
above cited.

* [86]

Temps E. 1.
Common 24.
17 E. 2. ibid. 23.
18 E. 3. 30.
20 E. 3. Ad-
measurement 8.
Mich. 26 & 27
Eliz. lib. 4. fol.
37.
Tirringham's
case.
Pl. Com. 498. b.

* See the first
part of the Insti-
tutes, sect. 184.

W. 2. cap. 46.
31 E. 1. Com-
mon. 26.
32 E. 1. ibid. 29.
3 E. 2. ibid. 21.
10 E. 3. 56.
34 Aff. 11.
22 Aff. p. 65.
7 H. 4. 33.
11 H. 4. 26. a.
F. N. B. 125.
See Bracton,
li. 4. fol. 228.

Bracton ubi
supra.

nion this statute extendeth not to a common in grosse, nor to a common sans number; tales, saith he, non ligat constitutio memorata, quia seoffamentum, (i. concessionem communie) non tollit, licet tollat abusum.

3. Si autem communia fuer' stricta cum numero averiorum certo, &c. (which he intendeth of common appendant) licet usus se largius et latius habuerit quam necesse esset, tales ligat constitutio quod coarctentur ad certum locum, et infra certum locum, dum tamen locus inde sufficiens sit et competens cum libero ingressu, et egressu, et competenti, quod non sit gravis nec difficilis: competens autem debet esse locus ita quod non longius distet, sed propinquius assignetur, &c. cum distantia inducit incommoditatem.

4. Item eodem modo si ita seoffatus fuerit quis, sine expressione numeri vel generis, sed ita, cum pastura quantum pertinet ad tantum tenementum in eadem villa, talem ligat constitutio sicut prius cum expressione; quia cum conslet de quantitate tenementi, de facili perpendi poterit de numero averiorum, et etiam de genere secundum consuetudinem locorum.

5. Item tempus spectandum erit cum omnis nova constitutio, futuris formam imponere debeat et non præteritis.

Walterus Bonde implacitat Aliciam de Bordeley, & vi. alios pro eo quod cum averiis suis blada sua ad Madingle crescentia noctanter depasti sunt, &c. Alic' & Nicholaus Russell dic' quod placea ubi transgressio supponitur fieri vocatur Leylonsfurlonge, quæ quidem placea semper fuit pratum usque ad prædictum annum quod prædictus Walterus prædictum pratum aravit, & seminavit, & in quo prato ipsa Alicia habet communiam suam post fena levata: et quia prædictus Walterus, ad auferendum ei communiam suam in prædicto prato, seminavit, sicut prædictum est, dicunt quod quando fena in pratis adjacentibus levata fuerunt, ipsi cum averiis suis communiam suam in prædicta placea depasti fuerunt, sicut eis bene licuit. Et inde ponunt se super patriam. Walterus dic' quod in electione sua est ad dimittend' prædictam placeam jacere pratum, & illud falcare, vel placeam illam arare, & seminare pro voluntate sua. Et de hoc ponit se super patriam, &c. * Jur' dic' quod prædicta placea à tempore quo non extat memoria fuit pratum falcabile, usq; ad prædictum annum quod prædictus Walterus illud aravit: dicunt etiam quod prædictus Walterus est parvus tenens ejusdem villæ, & * non licet alicui tali parvo tenenti sine licentia ipsius Aliciæ prata aliqua in eadem villa arare, & quod prædicta Alicia in eisdem pratis post fena asportata levata fuerint, ipsi cum averiis suis communiam suam in prædicta placea depasti fuerunt, sicut bene licitum est eis: ideo considerat' est quod * prædictus Walterus nihil capiat per breve suum, sed sit in misericordia. Et assen' per jur' ad dimid. marc.

Vide Pasch. 15 E. 1. in Banco. Rot. 6. Buck. Lib. 5. fol. 78. common of pasture, sub modo, or with limitation.

Throughout all this statute, *pastura et communia pasturæ*, is named so as this statute of approvements doth not extend to common of pishary, of turbary, of estovers, or the like.

(5) *Quod commodum suum de terris vastis, &c. fecerint.*] Now it is to be seene how this approvement must be. And it must be divided by some inclosure or defence, as it may be made severall, for it is lawfull to the tenant to put on his cattle into the residue of the common, and if they stray into that part,

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whereof

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Tr. 18 E. 1. in Banco Rot. 50. Cantabr.

Note this case for common, &c.

* Verdict.

* Note this custome.

* Note this, for feeding of corn, Vide 21 E. 4. 41.

* Judgement.

whereof the approvement is made, in default of inclosure, he is no trespasser.

And if the lord make a feoffment of certain acres, the feoffee may inclose, because the feoffment is an approvement in his nature.

(6) *Tunc inde sint contenti, et illi de quibus conquesti fuer' recedant quieti de hoc quod commodum suum de terris vastis, &c. fecerint.*] By the approvement of part according to this statute, that part by this act is discharged of the common, in so much as if the tenant which hath the common purchase that part, his common is not extinguished in the residue.

If the lord, &c. doe make an approvement, hee may improve est-foons as oft as hee will, so hee leave sufficient common, and so it was done in 18 E. 3.

If the tenant at the time of the approvement have sufficient common left unto him in the residue, with a competent way thereunto, according to this act, and after the residue becommeth not sufficient; yet the approvement remaineth good, for the words of this act be, *tantam pasturam habeant, quantum sufficit ad texementa sua.*

(7) *Coram iusticiariis recognitum fuit, &c.*] And yet it may bee tried in an action of trespassse: for many times he shall faile to have an assise.

Or if the lord doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common.

Bracton reciteth a writ devised upon this statute by that sage of the law William de Raleigh, one of the kings justices, in case where the lord was disturbed to inclose, or when hee had inclosed according to this statute, and his inclosure broken downe, which you may reade there at large.

(8) *Et per assisam recognitum fuit.*] If by the assise it shall be found, that the plaintife had not sufficient ingresse and egressse, or not sufficient pasture, then the plaintife shall recover seisin by the view of the jurors; so that by the discretion and oath of them, the plaintife shall have sufficient pasture, and sufficient ingresse and egressse assigned to him, and that the disseisors shall be amerced, and yeeld damages.

Upon this branch of the statute, we have a notable case in our books, viz. a commoner brought an assise of common of pasture belonging to his freehold, the tenant said, that he was lord, &c. and approved part of his waste, and left the plaintife sufficient common, &c. The plaintife denied that he left sufficient common, and thereupon issue was taken, and Sir William Herle chiefe justice of the court of common pleas tooke the assise, and the assise found, that the plaintife had not sufficient common; whereupon the court did award that the plaintife should recover his common, &c. and the recognitors of the assise were going from the barre: and albeit the issue was found against the tenant, yet for his advantage the recognitors of the assise ought to come back again, and to ordaine by their discretion and oath sufficient common to the plaintife, so that the defendant might approve of the remnant by this statute of Merton, as Trewood affirmed: whereupon Sir William Herle perused this statute (for no man can carry the words of a positive law by parliament in his head) and found the statute as Trewood had said, and

31 E. 1. Common 27. 16 E. 2. Garr. de Chart. 31.
10 E. 3. 15.

Dier. Mich. 16
& 17 Eliz. 339.

18 Aff. p. 4.
18 E. 3. 30. 43.

8 Aff. 18.
16 E. 3.
Common 9.

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10 E. 3. 15.

8 E. 3. 38.
16 E. 3.
Common 9;
22 Aff. 42.
15 H. 7. 10.
Bracton, li. 4. fo.
222. a. & 227.

7 E. 3. fol. 67.

therefore was in purpose to have caused the jurors to come againe (the record yet being in his brest) to appoint sufficient common to the plaintife according to the statute, but it was prevented, for that the parties agreed,

CAP. V.

SIMILITER provisum est, et à domino rege concessum, quod de cætero non current usuræ contra aliquem infra ætatem existentem a tempore mortis antecessoris sui, cujus hæres ipse est usque ad legitimam ætatem suam, ita tamen quod propter hoc non remaneat solutio debiti principalis simul cum usuris ante mortem antecessoris sui, cujus hæres ipse est inde provenientibus.

LIKEWISE it is provided and granted by the king, that from henceforth usuries shall not run against any being within age, from the time of the death of his ancestor (whose heir he is) unto his lawful age; so nevertheless, that the payment of the principal debt, with the usury that was before the death of his ancestor (whose heir he is) shall not remain.

(1 Inst. 246. b. 1 Roll. 151. 37 H. 8. c. 9.)

[89]

Inter leges Sancti Edw. Lamb. Si quis de usura convictus. Gl. 1. lib. 5. ca. 16. Ockham ca. qualiter non a. toritur. Ca. Itineris de Christianis usurariis 15 E. 3. ca. 5. Rot. parl. 50 E. 3. nu. 58. 6 R. 2. nu. 57. 14 R. 2. nu. &c. a Sa. de Judaismo see hereafter the exposition of it.

This statute hath been diversly expounded.

1. That this statute extended to the usurious Jewes, that then were in England: for at that time and before the conquest also, it was not lawful for Christians to take any usury, as it appeareth by the lawes of Saint Edward, &c. and Glanville and other ancient authors and records. And by this act it is manifest that the usury intended by the statute was not unlawfull, for the usury due before the death of the auncestor is enacted to be paid, and after the full age of the heire also, and no usury was then permitted but by the Jewes only.

a But king Edward the first (that mirror of princes) by authority of parliament made this law, which is worthy to be written in letters of gold: Forasmuch as the king had seene that many of the evils and disherisons of the good men of his realme had come to passe by the usuries which the Jewes had made in times past, and many other mischieses had risen thereupon, albeit that the said king and his auncesters have had great profit of the Jewes: nevertheless in honour of God, and for common weale of the people; it is ordeined and established, that no Jewe from thenceforth should take any usury, &c. But yet provideth for the time past in such manner, as by the act appeareth.

And true it is, that great was the profit (as in that act is recited) that the crowne had by the Jewes, b for betweene the 50 yeare of H. 3. and the 2 yeare of E. 1. the crowne was answered *de exitibus Judaismi* foure hundred and twenty thousand pounds, and then the ounce of silver was five groats.

Others expound these words *non current usuræ contra aliquem infra ætatem existentem* in this manner, that the rent shall not be doubled during the nonage of the heire (which in a large sense is called usury, for *dicitur usura quia datur pro usu æris*). As if the king

b Rot. Pat. 3 E. 1. m. 14. 17. 26.

Pl. com. 126. b. 35 H. 6. 61.

king give land to another, reserving a rent payable at a feast certain, and for default of payment, that he shall double the rent for every default, and after the grantee dieth his heire within age, he shall not double the rent to the king.

If a man by obligation bind himselfe and his heires to pay 100 l. at such a feast, and if he pay it not at that feast, that then he and his heires shall pay 10 l. for every quarter it shall be behinde, the obligor dieth and leaveth assets in fee simple his heire within age, he shall have his age, and shall not pay this 10 l. incurred during his minority after his full age; and this agreeth with the words of the statute, *Non remaneat solutio debiti principalis*, and in this case there is a *principale debitum*, but *debitum* signifieth not only debt, for the which an action of debt doth lie, but here in this ancient act of parliament it signifieth generally any duty to be yeilded or paid; for *debitum* is derived of the verb *debeo*, *id enim est, quod vel lege naturæ, vel obligatione civili debetur*, as rents and the like.

So if A. knowledge a recognizance to B. of 20 l. to be paid at a certain feast, and A. doth grant, that if the 20 l. be not paid at the day, then he shall pay 10 s. a weeke for every week it shalbe behind, and before the feast A. dieth seased of fee simple lands, his heire within age; in a *seire facias* upon the recognizance the heire shall have his age, as in the next case before, by the common law, and after his full age he shall be freed of the 10 s. a weeke by this statute.

11 H. 7. 22.
Mich. 26 & 27.
El. lib. 3. fol. 13.

11 E. 3. age 4.
15 E. 3. ibidem.
95. 29 ass. 37.
29 E. 3. 50.
42 ass. 4.

C A P. VI.

* [90]

DE hæredibus per parentes, vel per alios, contra pacem vi abduclis, vel detentis, seu maritatis, ita provisum est, qd. quicumque * laicus inde convictus fuerit (1), quod puerum aliquem sic detinuerit, abduxerit, seu maritaverit, reddat perdati valorem maritagii: et pro delicto corpus ejus capiatur, ut imprisonetur, donec perdati emendaverit delictum si puer maritetur: et præterea donec domino regi satisfecerit pro transgressione sua. Et hoc de hærede infra quatuordecim annos existens (2). De hærede autem cum sit quatuordecim annorum, vel ultra, usque ad plenam ætatem, si se maritaverit sine licentia domini sui, ut ei auferat maritagiū suum, et dominus ejus offerat (3) ei rationabile maritagiū, ubi non disparagetur (4), dominus suus tunc teneat terrā (5) ejus ultra terminū ætatis suæ, scilicet xxj. annorum, per tantū tempus quod inde possit percipere (6) dupli-

OF heirs that be led away, and withholden, or married by their parents, or by other, with force against our peace, thus it is provided, that whatsoever layman be convict thereof, that he hath so withholden any child, led away, or married, he shall yield to the loser the value of the marriage; and for the offence his body shall be taken and imprisoned until he hath recompensed the loser, if the child be married; and further, until he hath satisfied the king for the trespass. And this must be done of an heir being within the age of fourteen years. And touching an heir being fourteen years old, or above unto his full age, if he marry without licence of his lord to defraud him of the marriage, and his lord offer him reasonable and convenient marriage (without disparagement) then his lord shall hold his land beyond the term of his age, that is to say,

plicē valorē maritagii, secundū æstimationē legaliū hominū (7), vel secundū quod ei pro eodē maritagio prius fuerit oblatum, sine fraude et malitia (8), et secundū quod probari poterit in curia domini regis.

say, of one and twenty years, so long that he may receive the double value of the marriage after the estimation of lawful men, or after as it hath been offered before without fraud or collusion, and after as it may be proved in the king's court.

Bracton, lib. 2. fo. 91. Fleta, li. 1. cap. 12. 3 E. 3. 3. 8 E. 3. 52. 21 E. 3. 52. 21 E. 3. 19. 29 aff. 35. 29 E. 3. 37. (1 Inst. 76. a. 4 Rep. 82. 6 Rep. 74. 9 Rep. 72. Dyer, 255. to 260. pl. 23. Bro. Forf. de Marriage, 9, 12, 13. Bro. Gar. 109. 40 Ed. 3. 6. 1 Inst. 80. a. 81. b. Hob. 94. 90.)

Tr. 9. El. lib. 9. fo. 72 Doct. Hufley's case.

7 E. 3. 58. 40 E. 3. 6. 31. aff. 26 F. N. B. 141.

Before the making of this statute the law gave the lord two severall remedies, if his ward were taken away, detained, or married, viz. 1. An action of trespassse, wherein he should recover damages only. 2. Or a writ of right of ward, wherein he should recover the custody of body, and lands, but if the ward were married, then was he driven to his action of trespassse *Quare se intrusit maritagio non satisfact.* The lord had also his writ, but that lieth against the heire, when he entreth into the land before or after his full age: also the lord may have his writ *de valore maritagii* at the common law, but that lay also against the heire himselte after his full age when he intruded not.

The writ of *ravissement de garde* is framed by the statute of W. 2. cap. 35. whereof more shalbe said hereafter in his proper place.

8 E. 3. 52. Regist. 161.

This statute giveth, that in the writ of right of ward the plaintife should recover *Valorem maritagii, et pro delicto corpus ejus capiatur, ut imprisonetur donec perdati emendaverit delictum, si puer maritetur: et præterea donec domino regi satisfecerit pro transgressionem sua.*

Mirror, ca. 5. § 3.

(1) *Si laicus inde convictus fuer.*] The Mirror saith, that this point is reprobable, insomuch as the statute extends not to clerks, *car est nient plus droit que clerke peche sans payne, que lay home.*

35 H. 6. 53. See the first part of the Institutes, § 104. Customier de Norm. cap. 33. & les comentaries superinde.

(2) *Et hoc de hærede infra 14. annos existen.*] Upon these, and the words subsequent this statute doth not extend to the heire female, for the age of consent to mariage of a male is 14, and of a woman 12, and after 14 (at the making of this statute) the female was to be out of ward.

But note albeit the mariage within the age of consent be voydable, yet the gardein shall recover the value, and albeit the heire at the age of consent disagree, so as the gardein shall have the mariage again, yet there is no remedy for the ravisher.

7 H. 6. 12. 21 E. 3. 19. 20. 27 H. 6. gard. 18. 1. part of the Institutes, text. 103.

Now what alterations the statute of W. 1. cap. 22. and W. 2. cap. 35. have made, doe at large appear in Doct̃er Hufleys case abovesaid, and in the first part of the Institutes.

(3) *Si se maritaverit sine licentia domini, &c. Et dominus ejus offerat.*] Here the statute provideth remedy when the heire male, after the age of 14 yeares (when he may, as is aforesaid, consent to mariage) after tender made marieth himselte without the licence of his lord, and giveth a writ of forfeiture of mariage, so called, because the lord shall thereby recover the double value of the

the mariage; as if the mariage were worth one hundred pounds, he shall recover two hundred pounds. But this forfeiture of mariage is not due by this statute, but where the gardein after 14, and before 21, had tendered a covenable mariage to him, and he refused her, and of himselfe married (as it were in despite of him) another within age; and so is this statute to be construed, that the ward married himself without licence, &c. after the lord had tendered unto him a covenable mariage; for if the ward first marie himselfe after the age of 14, a tender of mariage to him that is so married is void, and the statute must be intended of a lawfull tender. And this statute that only giveth the forfeiture of mariage not extending to an heire female, there is no forfeiture of mariage of an heire female.

But if a ward be taken away and married *infra annos nobiles*, at the age of ten yeares, there, for that he may disagree, the lord may tender to him after his age of fourteen, which if he refuse, and after disagree, and marry elsewhere within age, the gardein shall have the forfeiture.

(4) *Ubi non disparagetur.*] Vide Magna Charta cap. 6. and see the next chapter following.

(5) *Dominus suus tunc teneat terrā, &c.*] The lord shall have election either to waive the land, and to take his action of forfeiture of mariage, (for perhaps the land may be of small value, and the mariage of great value,) or to enter into the land, and take the profits, till of the same he be satisfied thereby of the double value: for the words of the statute be *per tantum tempus quod inde possit percipere duplicem valorem*, so as the taking of the profits in that case shall goe in satisfaction of the double value; but if the heire ouste the gardein before he be fully satisfied of the forfeiture, the gardein shall recover the whole forfeiture against him, because the heire shall not take advantage of his owne wrong, and the double value is casual.

The king shall have the forfeiture of the mariage, albeit he be not particularly named, but then the king must pursue the statute, and make a tender, for in case of the forfeiture there must be a tender, but not for the single value.

The grauntee of the body only either by the king or a common person shall not retaine the land, but he may have upon a tender and mariage elsewhere within age a forfeiture of mariage.

If the gardein entereth into the land for the double value, he cannot have a writ of forfeiture of mariage, although he waive the possession of the land.

(6) *Quod inde possit percipere, &c.*] If the gardein entereth into the land, and after suffer others to take the profits, ye he shall hold it no longer then he might have levied the double value, and his negligence shall be his own damage.

Although the statute saith, *Dominus teneat terram*, yet if he die, his executors or administrators shall hold the land, or have a writ of forfeiture of mariage, for this act had vested an interest therein in the lord, which after his death goeth to his executors, or administrators, as it doth to the successors of an abbot.

But if the heire in ward die either within age, or of full age before the value or the forfeiture (as the case require) be yeilded or paid, there the lord hath no remedy by action for this incertain personall

18 E. 3. 18. 14 E.
3. Action sur
lestatute 16.
F. N. B. 241. g.
Regist.

1. part of the
Institutes, § 103.
Bro. forfeiture
de marriage 12.
4 Jacobi, lib. 6.
fo. 70, 71.
Seignor Darcies
case. 19 E. 3.
Judgement 123.
W. 1. c. 22.
No forfeiture of
marriage of an
heire femal.

18 E. 3. 182.
E. 2. action sur
lestatute 23.
16 E. 3. ibidem
14.

43 E. 3. 20.
13 H. 7. 7.
40 E. 3. 6.
4 Jac. li. 6.
fo. 70.
Dier 9 El. 260.
b.

Temps E. 1. ac-
tion sur lestat.
36.

Michi. 41 & 42.
El. li. 4. 82. Sir
Andrew Corbets
case. 15 E. 4, 5.

7 H. 6. 12.
11 H. 6. 8.
15 H. 7. 14.
See the 1. part
of the Institutes,
sect. 110.
27 H. 8. 3.
28. ass. 7.
11 H. 4. 82.
Dier 14. El. 406.
41. ass. p. 15.

7 H. 4. 6.
18 E. 3.
18 Dier ubi
supra.

[92]

personall duty against his heires, executors or administrators, no more then an action of debt lyeth against executors upon an escape made by the gardien upon the statute of W. 2. and yet Thirning chiefe justice held opinion, that if I give lands in tayl to hold of me by knights service, and the donee *devie son issue deins age, et ieo tender a luy mariage, et il ceo refuse, et luy marie sans ma volunt, uncore estant deins age, et puis morust in cest case ieo retiendra la terre pur la forfeiture del double value accordant al statute de Merton, et le prochein heire in tayle navera remedy*, whereby it appeareth that by his opinion the gardein after the death of the heire might hold the land by this statute for the double value.

Wherein it is to be observed that the lord, or donor shall have nothing but the land holden of him, and which moved from him, until he be satisfied with the profits of that land of the double value by the words and meaning of this statute, the words whereof be, *teneat terram per tantum tempus quod inde possit percipere duplicem valorem*. But otherwise it is of the single value, for there the profits taken by the lord goe not in satisfaction of the value, as shall be said in the next chapter.

14 El. Dier,
306.

And the grantee of the body only is without remedy, if the heire dieth.

And albeit the statute saith *teneat terram*, yet it extendeth to the holding of the mesnalty by the lord paramount, and in many cases the mesne shall be supposed to hold the land.

(7) *Secundum estimationem legalium hominum.*] That is, by a jury of twelve men in an action to be brought: concerning the forfeiture or value of the marriage consideration must not only be had of that land that is holden, but of all other lands, leases, goods, and chattels, and other personall estate which may advance the estimation of the ward, and yet the value of the marriage ought to be so moderate, as the heire may well undergoe the same.

(8) *Vel secundum quod ei pro eodem maritagio prius fuerit oblatum sine fraude, &c.*] And herein the gardein hath the election either to have so much, as an indifferent jury will give him, or so much as for the marriage have *bona fide* been offered unto him.

CAP. VII.

DE dominis qui maritaverint illos quos habent in custod' villanis, vel aliis, sicut burgenf. ubi disparagent': si talis hæres fuerit infra 14. annos, et talis ætatis quod consentire non possit matrimonio: tunc si parentes conquerantur de illo domino, dominus ille amittat custodiā usque ad ætatem hæredis, et omne commodū quod inde perceptū fuerit, convertatur in commodū ipsius hæredis, qui infra ætatem est, secundum dispositionem et provisionē parent' suorū, propter dedecus ei factum. Si autē fuerit 14. annorū et ultra, qd. consentire poterit, et tali maritagio consenserit, nulla sequatur pœna. Si quis hæres, cujuscunque fuerit ætatis, pro domino suo se noluerit maritare, non compellatur hoc facere, sed cum ad ætatē pervenerit, det domino suo, et satisfaciat ei de tanto, quantum inde percipere possit ab aliquo pro maritagio suo (1), antequam terrā suā recipiat, et hoc si vese voluerit maritare, siue non: quia maritagiū ejus, qui infra ætatem est, de mero jure pertinet ad dominum feodi (2).

AND as touching lords, which marry those that they have in ward to villains, or other, as burgesfess where they be disparaged, if any such an heir be within the age of fourteen years, and of such age, that he cannot consent to marriage, then, if his friends complain of the same lord, the lord shall lose the wardship unto the age of the heir; and all the profit, that thereof shall be taken, shall be converted to the use of the heir being within age, after the disposition and provision of his friends, for the shame done to him; but if he be fourteen years, and above, so that he may consent, and do consent to such marriage, no pain shall follow. If an heir (of what age soever he be) will not marry at the request of his lord, he shall not be compelled thereunto; but when he cometh to full age, he shall give to his lord, and pay him as much as any would have given him for the marriage before the receipt of his land, and that whether he will marry himself, or not; for the marriage of him that is within age of meer right pertaineth to the lord of the fee.

(9 H. 3. c. 6. Regist. 161, &c. 3 Ed. 1. c. 22. 13 Ed. 1. stat. 1. c. 35. Kel. 133. Dyer, 25. 260. 306. Fitz. Brief. 937. Fitz. Gard. 68. 128. 131. 138. 153, 156. 6 Rep. 70. 73. 5 Rep. 126. b. Co. Ent. 396. Cro. El. 469.)

Sicut burgenfibus, &c.] Hereof see the first part of the Institutes: and albeit the statute of 5 R. 2. cap. 4. doth rank divers degrees that are to come to parliament, as dukes, earles, barons, bannerets, knights of shires, citizens, and burgesfess; yet this act of Merton doth extend also to citizens, because all cities were first burroughs, and with the Saxon and Germane burgh signifieth a city.

This statute concerning disparagement doth not extend to heires females, but onely to heires males, therefore the forfeiture given by this statute onely extends to the case of the heir male, but by other statutes the disparagement of the heir female is forbidden.

(1) *Det domino, et satisfaciat ei de tanto quantum inde percipere possit de aliquo pro maritagio suo antequam terram suam recipiat.*] Note the severall pennings of this clause concerning the single value, and the clause in the chapter next before concerning the double value,

[93]
See the first part
the Institutes,
sect. 107, 108.

Magna Charta,
cap. 6. W. 1.
c. 22.
1 pt. Inst. sect.
107.

43 E. 3. 20.
31 A.T. 26.
27 H. 3. 4.

Mich. 41 et 42
El. lib. 4. fol. 82.
Sir Andrew
Corbet's case.

See the first part
of the Institutes,
sect. 110.

Mich. 4 E. 1. in
Banco Rot. 118.
Lincolne, a no-
table case for
holding the land
for the forfeit of
the marriage.

* Keylw. 133,

134.

Hil. 4 Jac. li. 6.
fol. 70, 71.

Pasch. 3 Jac.
li. 5. fol. 126,
127.

Casus in Cur.
Wardorum. Tr.
29 Eliz.

35 H. 6. 40. b.

value, and for the single value the gardein shall hold the land untill the heire satisfie him of the valug, so as in this case the taking of the profits shall not be accounted as parcell of the value, but as a penalty to cause the heire to pay it the sooner.

* But note, that neither in the writ *De valore maritagii*, nor for forfeiture of marriage, the lord shall not recover the land, but damages, for this act giveth no action for the land.

And the words of this branch are to be observed, *Cum (hæres) ad ætatem pervenerit, det domino suo*, whereby it appeareth that the payment of the single value is personally appropriated to the heire, and therefore if he dieth, it is lost, but the clause concerning the double value is otherwise penned, as hath been observed.

(2) *De mero jure pertinet ad dominum feodi.*] See for the exposition of this branch, and where a tender is requisite, and concerning the differences between the case of the heire male, and of the heire female, the lord Darcies case, and Palmers case, and the first part of the Institutes, sect. 107. Hereunto may be added a case, where the lord cannot at any time seise the ward, or tender a marriage to him, and yet he shall have the wardship. Edward Hampden holding lands of the queen by knights service in capite had issue a daughter, who *post annos nubile* (viz. at twelve yeares) contracted matrimony with William Ditton, and after married with John Croke, and then the father died seised in fee of the land in capite, his daughter being of the age of thirteen yeares, and after the daughter had passed the age of sixteen yeares, her marriage with Croke was dissolved by divorce, *causa præcontractus*: and it was resolved by both the chiefe justices upon hearing of counsell learned on both sides, that in this case (or the lord in the like case) shall have the wardship of the daughter, albeit never any seisure could be made of her, nor tender of marriage to her, because the marriage was never lawfull, and was after dissolved by divorce, as it had never been, and she shall take no advantage of her own wrong, to barre the queene or other lord of that which by law is due to them, notwithstanding the opinion of Laicon, 35 H. 6. 40. b. that if one hold land of another by knights service, and the tenant hath issue a daughter, which entreth into religion, and is professed, and after the tenant dieth, his daughter being in religion, and within fourteen yeares, and when she is of the age of fourteen she is deraigned, that shee shall not be in ward. *Nota*, he sheweth not for what cause she was deraigned: But by the divorce, *causa præcontractus*, there is a nullity of the mariage, *ab initio*, and the children between them are meere bastards.

[94]

C A P. VIII.

DE narratione discensus in brevi de recto (1) ab antecessore a tempore H. regis senioris anno et die, provifum est, quod de cætero non fiat mentio de tam longinquo tempore, sed a tempore H. regis avinoftri, et locum habeat ifta provisio

TOUCHING conveyance of descent in a writ of right from any ancestor from the time of king Henry the elder, the year and day, it is provided, that from henceforth there be no mention made of so long time,

visio ad Pentecosten, anno regni domini regis nunc 21. et non antea: et brevia prius impetrata procedant. Brevia mortis antecessoris, de nativis, et de ingressu, non excedant ultimum redit' domini regis Johannis de Hibern' in Angliam (2), et locum habeat ista provisio, &c. ut supra. Brevia novæ disseisinæ non excedant primam transfretationem domini regis qui nunc est in Vascon' (3), et locum habeat ista provisio a tempore prædict', et brevia prius impetrata procedant (4). Vide West. 1. cap. 38. et 32 H. 8. cap. 2.

time, but from the time of king Henry our grandfather; and this act shall take effect at Pentecost, the one and twentieth year of our reign, and not afore, and the writs before purchased shall proceed. Writs of mortdauncement, of nativis, and entre, shall not pass the last return of king John from Ireland into England; and this act shall take effect as before is declared. Writs of novel disseisin shall not pass the first voyage of our sovereign lord the king, that now is, into Gascoine. And this provision shall take his effect from the time aforesaid; and all writs purchased before shall proceed.

(1 Inst. 114. b. 115. b. 3 Ed. 1. c. 39. 21 Jac. 1. c. 16.)

(1) *De narratione discensus in breve de recto.*] It appeareth by Glanvill, that in the raigne of H. 2. the limitation in an assise of novel disseisin, was *post ultimam transfretationem regis in Normaniam*, which was in the year of his raigne.

But of this limitation he saith, *Infra tempus à domino rege de consilio procerum ad hoc constitutum, quod quandoque majus, quandoque minus censetur, &c.*

The limitation in the assise of mordaunc', was *post primam coronationem H. 2.* which was 20 Octob. 1154.

The limitation in a writ of right before this statute of Merton, was *à tempore regis H. 1.* and now by this statute of Merton, *à tempore regis H. 2.* Note H. 1. began his raigne the first of August 1100. and H. 2. began his raigne 1154. so as this statute of Merton did abridge the limitation in a writ of right 54 yeares, whereof Bracton speaketh thus, *Quia breve de recto sicut alia brevia infra certum tempus limitatur, non enim excedit tempus regis Henrici avi domini regis (1 H. 2.) et est ratio, quia ultra tempus illud (quod inter initium regni H. 2. et statutum de Merton, anno 20 H. 3. est circiter nonaginta annos) non poterit quis aliquid probare, licet jus habeat in re: cum nullus aliquid probare possit ultra tempus illud, ex quo loqui non poterit de visu suo proprio, vel de visu patris suo, qui ei injunxit quod testis esset si inde audiret loqui; et unde si quis loqueretur de tempore Henrici regis senis, (1 H. 1. quod fuit circiter 125. annos) amittere possit propter defectum probationis.*

(2) *Brevia mortis antecessoris, de nativis, et de ingressu non excedant ultimum reditum domini regis Johannis de Hibernia in Angliam.*] King John went first into Ireland in the second year of his raigne, and returned in the third year: In the 12 year of his raigne he went into Ireland againe, and returned the same year into England, and this was *ultimus reditus*, that this act speaketh of, so as betweene the twelfth year of king John, and 20 H. 3. were about twenty five yeares.

(3) *Brevia novæ disseisinæ non excedant primam transfretationem domini regis qui nunc est, viz. H. 3. in Vasconiam.*]

Glan. li. 130

c. 33.

Custumier de

Norm. cap. 22.

110, 111. 125.

Idem eodem lib.

cap. 32.

Eodem libro, c. 3.

Braet. li. 4. fo.

373.

Fleta, lib. 4. c. 5.

& lib. 2. c. 38.

[95]

King

King H. 3. first passage into Gasconie, was in the fift yeare of his raigne, so as there exceeded not the fifteen yeares between that transfretation and this statute.

Braet. l. 2. fol. 179.

It appeareth by Braeton, that before this statute of Merton, the limitation in a writ of assise, was *Post ultimum reditum domini regis de Britannia in Angliam*.

W. 1. c. 38. W. 2. c. 2. & 46.

But these times of limitations were altered in the raigne of king Edw. 1.

Tr. 7 E. 1. in Banco Rot. 71. Hunt.

And then the limitation in a writ of right was from the time of king R. 1. betweene the beginning of R. 1. and 3 E. 1. there had passed about eighty eight yeares.

Mich. 7 E. 1. ibid. Rot. 50. Cantab.

And that the writ of assise of *novel disseisin* and the writ of purparty, which is called the *nuper obiit*, should have the terme of the first transfretation of H. 3. into Gascony, which as hath been said, was in anno 5 H. 3.

Regula.

And the writs of *Mordaunc'*, *de Cofnage*, *de Aiel*, *de Entre*, et *bre. de Nefte* eyent le terme de coronement mesme le Henry, 1 H. 3. which between that and this statute of W. 1. was about 58 years: Note (as hath been said) this king was twice crowned, first the 28 day of October, in the first yeare of his raigne, and the second time on Whitsonday, in the fourth yeare of his raigne: but this statute of W. 1. speaking indefinitely, is to be understood of the first coronation, for *quod prius est tempore potius est jure*; And by the statute of W. 2. cap. 2. in an avowry the like limitation for seisin shall be accounted, as in the assise, which, as is aforesaid, is *post primam transfretationem Regis Henrici 3. in Gasconiam*.

32 H. 8. cap. 2. 1 Mar. cap. 5.

But albeit these times of limitations were reasonable, when these statutes were made, yet in proceſſe of time (there being set times appointed in former kings raignes) the times of necessity grew too large, whereupon many suits, troubles, and inconveniences did arise, and therefore the makers of the statute of 32 H. 8. took another, and more direct course which might indure for ever, and that was to impose diligence and vigilancy in him that was to bring his action, so that by one constant law certaine limitations might serve both for the time present, and for all times to come, viz. That the demandant should alledge seisin in a writ of right not above sixty yeares next before the teste of his writ. In *mordaunc'*, *cofnage*, *aiel*, *entry sur disseisin*, or other possessory action upon the seisin or possession of any of his auncestors or predecessors, of a seisin within fifty yeares: In any action upon his or their own possession within thirty yeares: In an avowry, or consuance for any rent, sute, or service within 40 yeares; In a *formedon* in reversion or remainder, or *seire facias* upon fines within fifty yeares; and yet this statute prefixing a certain time extended not to divers cases, which were within the auncient statutes, as to accidental services, as hereafter shall appeare. See the first part of the Institutes, sect. 170.

Braet. l. 4. fo. 223. Tr. 7 E. 1. Rot. 71. in Banco. Hunt. Braet. l. 2. fo. 228. 1 pt. Inst. sect. 170. lib. 4. fol. 10. 11. lib. 7. fol. 40. lib. 8. fol. 65 & 126.

(4) *Brevia prius impetrata procedant, &c.*] For the rule is, *Omnis nova constitutio futuris formam imponere debet, et non præteritis*. See a case upon this branch in 7 E. 1. Tho. de Redberwes case.

And albeit Braeton saith, that *omnes actiones in mundo infra certa tempora limitationem habent*; and in another place he saith, *Omnis querela et actio injuriarum limitata est infra certa tempora*; yet some actions

actions were not limited by any statute, as by divers authorities quoted in the margent appeareth.

But somewhat more is necessary to be added to the former reports, and booke cases before quoted in the margent, for the said act of 32 H. 8. extends only concerning avowries to rent, sute, or service, so as reliefe is not within the purview of the law, for it is no service but a duty, by reason of the tenure and service*, and albeit homage, fealty, and escuage, and other accidentall services (being services) are within the letter of the law, yet they and all other accidentall services, as heriot service, or to cover the lords hall, and the like, for that they may not happen within the times limited by that act, are by construction out of the meaning of this statute of 32 H. 8. as it appeareth by the cases quoted before: but albeit reliefe be not within this statute, yet in avowry for reliefe, the avowant must alledge a seisin of the services within the auncient statute, viz. *Post primam transfretat. regis Henrici in Gasconiam*, and the seisin of the services is traversable.

And so it is of homage, and fealty, and escuage; albeit they be out of the statute of 32 H. 8. yet are they within the auncient statute.

And it is to be noted, that where the tenure is by homage, fealty, and escuage incertain, and by suite of court, or rent, or any other annuall service, the seisin of the sute or rent, or any other annuall service is a good seisin of the homage, fealty, or escuage, or other accidentall services, as wardship, heriot service, or the like: and hereby (if you shall heedfully peruse over the reports and booke cases before quoted) you shall understand the same the better.

By this act it is declared, that the said act of 32 H. 8. shall not extend to writs of right, of advowson, *quare impedit*, assise of *darrein presentment*, or *jure patronatus*, nor to any writ of right of ward, writ of ravishment of ward, for the body or land holden by knights service, but that these actions may be maintained, as they might have been before the making of the said act of 32 H. 8.

And seeing personall actions are at this day more frequent, then they have been in times past, it were to be wished for establishment of quiet, and avoiding of old suits, that Bractons rules by some new provision extended to them also, and that they were limited within some certain time.

Since we wrote this commentary, there is a good statute made concerning certain personall actions, in *anno 21 Jacobi regis*, ca. 16. and therein a limitation set down in the formedon in discender, formedon in remainder, and formedon in reverter.

CAP. IX.

AD breve regis de bastardia, utrum aliquis natus ante matrimonium habere poterit hereditatē, sicut ille qui natus est post matrimonium, responderunt omnes episcopi, quod nolunt nec possunt ad istud breve respondere, quia
II. INST. hoc

TO the king's writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not, nor could not, answer

lib. 9. fol. 36.
li. 11. fol. 68.
17 E. 3. 11.
20 E. 4. 14.
Fleta, lib. 2. ca. 28.
7 E. 6. Br. avowry 96. gard 69.
Bract. li. 2. fo. 52. & lib. 4. fol. 314.

* [96]

13 H. 4. fol. 6.
Edw. Latimer's case adjudged.

7 E. 6. tit. gard.
Br. 69. Avowr. 96.
31 E. 3. gard. fol. 118.

1 Mar cap. 5.
17 E. 3. fol. 11. a.
in Quare impedit.

hoc esset contra communem formam ecclesiæ (1). *Et rogaverunt omnes episcopi magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hæreditariam, quia ecclesiæ talis habet pro legitimis. Et omnes comites et barones una voce responserunt, quod nolunt leges Angliæ mutare, quæ hucusque usitæ sunt et approbatæ* (2).

swer to it; because it was directly against the common order of the church. And all the bishops instantiated the lords, that they would consent, that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forsomuch as the church accepteth such for legitimate. And all the earls and barons with one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved.

See the first part of the Institutes, sect. 399, 400. & 188. (Fitz. Bastardy, 21, 22, 25, 27, 28, 30, 33. 1 H. 6. 3. 11 H. 4. 34. 39 Ed. 3. 14 44 Ed. 3. 12. 12 Rep. 72.)

Vide Decret.
Gregorii 9. fol.
260. col. 1.

* [97]

Glanv. li. 7.
c. 15.

Braet li. 5. fo.
416, 417.
Fleta, lib. 6. c. 38.
Fortescue c. 39.
11 Aff. p. 20.

4 E. 1. Stat. de
Bigamis, c. 9.
simile.

Glanv. ubi supra.

(1) *Contra communem formam ecclesiæ, &c.*] For the better understanding of this branch, it is to be known, that in the time * of pope Alexander the third, (who lived anno Domini 1160, which was anno 6 H. 2.) this constitution was made, that children borne before solemnization of matrimony, where matrimony followed, should be as legitimate to inherit unto their auncestors, as those that were borne after matrimony, and thereupon the statute saith, *Ecclesiæ tales habet pro legitimis*.

Of this canon, or constitution Glanvill writeth thus, *Orta est quæstio, si quis antequam pater matrem suam desponsaverat fuerit genitus vel natus, utrum talis filius sit legitimus hæres, cum postea matrem suam desponsaverat: Et quidem licet secundum canones et leges Romanas talis filius sit legitimus hæres, tamen secundum jus et consuetudinem regni nullo modo tanquam hæres in hæreditate justinetur, vel hæreditatem de jure regni petere potest*.

And herewith doe agree not onely other auncient authors, but the constant opinion of the judges in all succession of ages ever since, of the auncient law of England. Hereupon these two conclusions doe follow:

1. That any forein canon or constitution made by authority of the pope, being (as Glanvill saith) *Contra jus et consuetudinem regni*, bindeth not untill it be allowed by act of parliament, which the bishops here prayed it might have beene; for no law, or custome of England can be taken away, abrogated, or adnulled, but by authority of parliament.

2. That although the bishops were spirituall persons, and in those dayes had a great dependency on the pope, yet in case of generall bastardy, when the king wrote to them to certifie, who was lawfull heire to any lands, or other inheritance, they ought to certifie according to the law, and custome of England, and not according to the Romane canons, and constitutions, which were contrary to the law, and custome of England, wherein the bishops sought at this parliament to be relieved.

See the first part of the Institutes, sect. 399, & 400. and adde thereunto:

Assisa venit, &c. Si Nicholaus de Lewkenor pat' Thom' de Lewkenor

nor fuit feifitus, &c. de mauerio de Southmymys quod Rogerus de Lewkenor tenet, qui dicit quod ipse est frater ipsius Thomæ antenatus de eodem patre, & eadem matre, & est feifitus de prædictis tenementis, & clamat per eundem discesum, et petit iudiciū. Thom' dic' quod Rogerus non potest clamare per eundē discesum, quia dicit quod idem Rogerus natus fuit extra sponsalia, &c. Et quia idem Tho' non potest didicere, quin idem Rogerus sit frater ipsius Tho' antenatus de eodem patre, & eadem matre, & post mortem prædicti Nicholai patris, &c. intravit in eisdem tenementis ut filius ejus & hæres, * consideratum est quod prædictus Rogerus ind' sine die. Et Tho. Nich. cap' per assisam, et sit in misericordia, &c.

Note by this judgment, that the bastard eigne to this intent is accounted heire, and of the blood with the mulier puisne, as the mulier puisne cannot have an assise of mordaunc' against him.

We remember not that we have read in any book of the legitimation, or adoption of an heire, but onely in Bracton, lib. 2. cap. 29. fol. 63. b. and that to no little purpose; but the surest adoption of an heire, is by learned advice, to make good assurance of the land, &c.

(2) *Et omnes comites, et barones, una voce responderunt quod nolunt leges Angliæ mutare quæ hucusque usitatæ sunt et approbatæ.*] The nobility of England have ever had the laws of England in great estimation and reverence, as their best birth-right, and so have the kings of England as their principall royalty and right belonging to their crown and dignity: this made king H. 1. that noble king surnamed Beauclerk, to write to pope Pascall, *Notum habeat sanctitas vestra, quod me vivente (auxiliante Deo) dignitates et usus regni nostri Angliæ non imminuentur, et si ego (quod absit) in tanta me dejectione ponerem, optimates mei et totus Angliæ populus id nullo modo pateretur.*

And it is worthy the observation, how dangerous it is (as elsewhere hath been often noted) to change an ancient maxime of the common law.

Some have written, that William the Conquerour being borne out of matrimony, Robert his reputed father did after marry Arlot his mother, and that thereby he had right by the civil and canon law, but that is *contra legem Angliæ*, as here it appeareth. And during this parliament in the 20 yeare of H. 3. it may be collected by the 23. and 24. epistles of Robert Grostead then bishop of Lincoln, directed to William Rawleighe (priest) then one of the kings justices, that this matter to bring the *nati ante matrimonium*, to be made legitimate was vehemently laboured by the clergy: and in the 26. epistle to the bishop of Canterbury, he findeth fault with the arch-bishop, for that the king and his counsell had resolved that the law and custome of the realme in this point should continue still: whereby it appeareth, that not onely the nobles, but the king himselfe was against it.

And in the letters, which all the nobilitie of England by assent of the whole cominalty assembled in parliament at Lincoln wrote to pope Boniface, it is thus conteyned, *Ad observationem et defensionem libertatum, consuetudinum, et legum paternarum ex debito præstiti sacramenti astringimur, quæ manutenebimus toto posse, totisque viribus cum dei auxilio defendemus, nec etiam permittimus aut aliquatenus permittemus, sicut nec possumus nec debemus præmissa tam insolita, indebita, præjudicialia, et alias inaudita dominum nostrum regem, etiam si vellet, fa-*

Pasch. 18 E. 1. in Banco Rot. 80. Mid. in Ass. de Mordaunc'.

Vide Mic. 15 E. 1. in Banco. Rot. 129. Hertf. Tr. 15 E. 1. ibid. Rot. 60. Not. * Judgement.

See the first part of the Institutes, sect. 400.

Chart. Hen. 1.

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William Malms. lib. 3. circa initium Ingulphus; lib. 6. cap. 19. See the Custom-er de Nor. ca. 27. fo. 42 & 44.

Rot. Par. 28 E. 1. apud Lincoln.

Jus coronæ.

cere, seu quomodolibet attemptare: (and there the inconveniences are set down,) præcipue cum præmissa cederent manifeste in exheredationem juris coronæ, regis Angliæ et regie dignitatis, ac subversionem status ejusdem regni notoriam, nec non in præjudicium libertatum, consuetudinum, et legum paternarum. Sealed by the severall seales of armes of 104. earles and barons, and in the name of all the comminalty of England. And to that effect king E. 1. wrote also to the pope.

Leges Angliæ.] Here our common lawes are aptly and properly called the lawes of England, because they are appropriated to this kingdome of England as most apt and fit for the government thereof, and have no dependancy upon any forreine law whatsoever, no not upon the civill or cannon law other then in cases allowed by the laws of England, as partly hath been touched before: and therefore the poet spake truly hereof, *Et penitus toto divisos orbe Britannos*: so as the law of England is *proprium quarto modo* to the kingdome of England; therefore forrein precedents are not to be objected against us, because we are not subject to forrein lawes.

And it is a note worthy of observation, that where at the holding of this parliament in anno 20 H. 3. and before, and some time after, many of the judges and justices of this realme were of the clergy, as bishops, deanes, and priests, and all the great officers of the realme, as lord chancellor, treasurer, privy seale, president, &c. were for the most part of the clergy; yet even in those times the judges of the realme, both of the clergy and laity, did constantly maintaine the lawes of England, so as no incroachment was made upon them or breach unto them by any forreine power, as partly hath been shewed in Caudries case: and many more judgements and authorities in law might be produced for the manifestation thereof: see the first part of the Institutes, many of the clergy judges and justices of the realme of ancient time.

Lib. 5. fo. 1. &c.
Caudries case.
1 part of the Institutes, § 534.

Bracton, lib. 5.
fo. 416, 417.

Et rogarunt omnes episcopi magnates ut consentirent, &c.] Here was the motion and request, but Bracton saith, *Rogarunt regem et magnates: et omnes comites et barones una voce responderunt, Nolumus leges Angliæ mutare, &c.* for so it is in ancient manuscripts.

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This is the first of this kind, that we remember, that hath been printed, for it is to be understood that by the parliamentary order all motions and petitions made (as this was) though they were denied, and never proceeded to the establishment of a statute, yet the same were entered into the parliament roll together with the answers therunto: but this is the first of this kinde (as hath been said) that hath been printed.

See the last
cha. of Merton
the like.
12 Aff. p. 20.

And yet in our books this is called a statute, for Sir Galfred le Scrope chiefe justice saith, before the statute of Merton the party pleaded not general bastardy, but that he was borne out of espousals; and the bishop ought to certifie whether he were borne before espousals or not, and according to that certificate to proceed to judgement according to the law of the land: and the prelates answered that they could not to this writ answer, and therefore ever since special bastardy (viz. that the defendant, &c. was borne before espousals) have been tried in the kings courts, and generall bastardy in court christian: and herewith agreeth our old books and the constant opinion of the judges ever since.

Bract. li. 5. fo.
416.
Fleta, li. 6.
cap. 38.
47 E. 3. 14.
21 E. 3. 49.
28 aff. 46.
46 E. 3. 3.

Now for that this point was resolved in parliament, it is here in a large sense called a statute.

CAP.

CAP. X.

PROVISUM est insuper, quod quilibet liber homo (4), qui sectam debet (1) ad comitatum, trithingum (2), hundredum et wapentagium (3), vel ad curiam domini sui, libere possit facere attornatum (5) suum, ad sectas illas pro eo faciendas (6).

IT is provided and granted, that every freeman, which oweth suit to the country, trything, hundred, and wapentake, or to the court of his lord, may freely make his attorney to do those suits for him.

(Fitz. Attorney, 106. Regist. 172. F. N. B. 156, &c.)

(1) *Sectam debet.*] *Nota*, There be two kinds of suits, viz. suit reall, that is, in respect of his reſiance to a leet or tourne: and suit ſervice, that is, by reaſon of a tenure of his land of the county, hundred, wapentake, or mannor whereunto a court baron is incident: before this act every one that held by ſuit ſervice ought to appeare in perſon, becauſe the ſuiters were judges in thoſe courts, otherwiſe he ſhould be amerced, which was miſchievous, for it might be, that he had lands within divers of thoſe ſeigniories, and that the courts might be kept in one day, and he could be but in one place at one time: but this ſtatute extends not to ſuit reall, becauſe he cannot be within two leets, &c.

(2) *Trithingum or trithinge.*] Here it ſignifieth a court which conſiſteth on three or four hundred, and doth not here ſignifie a leet or view of frankpledge.

(3) *Wapentagium.*] That, which in ſome countries is called a hundred court, in ſome countries is called a wapentake. * *Quod Angli vocant hundredum ſupradicti comitatus vocant wapentagium.* Now the reaſon of the name was this: when any on a certaine day and place took upon him the government of the hundred, the free ſuiters met him with launces, and he deſcending from his horſe, all roſe up to him, and he holding his launce upright, all the reſt, in ſigne of obedience, with their launces touched his launce or weapon: for the Saxon word *wapen*, is weapon, and *tac*, is *tactus*, or touching: and thereof this aſſemblie was called wapentake, or touching of weapon.

Now albeith he that holdeth by ſuit ſervice may make an attorney, yet that attorney cannot ſit as judge, as the free ſuiter himſelfe might doe, for he cannot depute another in his judiciall place; and the words of the ſtatute be, *Libere poſſit facere attornatum ad ſectas illas pro eo faciendas.*

(4) *Liber homo.*] This doth extend to free-holders in ancient demefne, but not to copie-holders.

(5) *Facere attornatum.*] He muſt make a letter of attorney under his ſeale, which the ſteward ought to allow; and if he doe not, the ſuiter may have a writ out of the chancery for the allowance of him: or if he doubted that he ſhould not be allowed, he might have a writ before-hand to receive him as attorney: and ſuch a writ ſhall ſerve during the life of the tenant, &c. for the words of another writ be, *Et quia virtus brevium noſtrorum de hujusmodi attornato*

41 E. 3. Avowry
77. Vid. Gloc.
c. 8.
W. 2. cap. 10.

Lamb. int. leges
Ed. regis, nu. 34.
Magna Cart.
c. 35. Temps E. 1.
Attorn, 106.
Regist. 172.
23 E. 3. cap. 4.
F. N. B. 156.
* Lam. verbo
centuria int.
leges Ed. regis,
nu. 33. Bracton,
lib. 3.

Mirror, cap. 5.
§ 3.

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Temps E. 1.
Attorney 106.

F. N. B. 156. E.
W. 1. cap. 33.

F. N. B. 157.

attornato faciendo terminum non capit, nec terminus limitatur durantibus personis, &c.

W. 1. cap. 33.
Customier de
Norm, cap. 65.

What such an attorney may doe, and who cannot be attorney, see the statute of W. 1.

(6) *Ad scētas illas pro eo faciendās.*] So as by force of this act he may doe such suit, as the free-holder ought to doe.

See the Register 19. This act extendeth to justices in eire.

C A P. XI.

DE malefactoribus in parcis, et vivariis (1) nondum est discussum, quia malefactors petierunt propriam prisonam (2) de illis, quos caperent in parcis, et vivariis suis. Quod quidem dominus rex contradixit, et ideo differtur.

CONCERNING trespasses in parks and ponds it is not yet discussed; for the lords demanded the proper imprisonment of such as they should take in their parks and ponds, which the king denied; wherefore it was deferred.

(1) *Vivarium.*] Is a word of a large extent, and *ex vi termini* signifieth a place in land or water, where living things be kept. Most commonly in law it signifieth parks, warrens, and pisheries or fishings; here it is taken for warrens and fishings, for that parks were named before.

(2) *Propriam prisonam.*] This petition of the lords in parliament stood upon three branches: 1. That they might imprison such as they should take in their parks or vivaries, which seemed to be against the 29 chapter of *Magna Charta*. 2. That they should have *propriam prisonam*, a prison of their owne, which no subject can have; for all prisons or gaoles are the kings prisons or gaoles, but a subject may have the custodie or keeping of them. 3. That they should not be imprisoned in the common gaole, All which *dominus rex contradixit*.

See the like before, cap. 9.

STATUTUM DE MARLEBRIDGE.

Editum 52 H. III. Anno gratiæ 1267.

Marlebridge.] Now called *Marleborough*, a town in Wiltshire, the greatest fame whereof is the holding of this parliament there. *Henricus vero, &c. Concilium convocavit Marlebrigium, quod est pagus celebris comitatus Wilceriæ, qui in eo conventu primum leges ab se latus, & præsertim Magnæ Chartæ de concilii sententia approbandas, deinde alias condendas curavit, quæ ad statum et commodum regni maxime conducere.* Polyd. Virg. p. 314. 10.

This towne in our books is called a citie, and the freemen thereof citizens. 39 E. 3. fo. 15.

52 H. 3.] This king raigned longest of any king since the conquest, or before, that we remember; for he raigned 56 yeares. But the great and famous queene Elizabeth was of greater yeares then any of her progenitors, for she attained neere to 70 yeares. So king H. 3. raigned longest, and queen Eliz. lived longest. She raigned the yeares of the emperour Augustus, and lived the yeares of king David.

ANNO gratiæ M.CC. LXVII.
regni autem domini Henrici filii regis Johannis quinquagesimo secundo, in octabis S. Martini, providente ipso domino rege, ad regni sui Angliæ meliorationem, et exhibitionem justitiæ (prout regalis officii exposcit utilitas) plenior, convocatis discretioribus ejusdem regni, tam majoribus quam minoribus: provisum est et statutum, ac concordatum et ordinatum, ut cum regnum Angliæ multis tribulationibus et dissensionum incommodis nuper esset depressum, reformatione legum et jurium (quibus pax et tranquillitas incolarum conservetur) indigeat, ad quod remedium salubre per ipsum regem et suos fideles oportuit adhiberi: provisiones, ordinationes, et statuta subscripta, ab omnibus regni ipsius incolis, tam majoribus quam minoribus, firmiter et inviolabiliter temporibus perpetuis statuerit observari.

IN the year of grace, one thousand two hundred sixty seven, the two and fiftieth year of the reign of king Henry, son of king John, in the Utas of St. Martin, the said king our lord providing for the better estate of his realm of England, and for the more speedy ministration of justice, as belongeth to the office of a king, the more discreet men of the realm being called together, as well of the higher as of the lower estate: it was provided, agreed, and ordained, that whereas the realm of England of late had been disquieted with manifold troubles and dissensions; for reformation whereof statutes and laws be right necessary, whereby the peace and tranquillity of the people must be observed: wherein the king, intending to devise convenient remedy, hath made these acts, ordinances, and statutes underwritten; which he willeth to be observed for ever firmly and inviolably of all his subjects, as well high as low.

This generall preamble to all the statutes of Marlebridge doth consist on foure parts.

1. The end wherefore these statutes were made, for *sapiens incipit a fine*, and that is two fold; 1. *ad meliorationem regni Angliæ.*
2. *Ad exhibitionem iustitiæ* (prout regalis officii exposcit utilitas) plenior.

2. Of what numbers this parliament consisted, *convocatis discretioribus ejusdem regni, tam majoribus, quàm minoribus.*

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3. What was the cause of calling this parliament, *cum regni Angliæ multis tribulationibus et dissentionum incommodis nuper esset depressum.* The many fearfull and dangerous troubles and dissentions between the king and his barons, which I had rather you should reade in history, then I should relate, grew originally out of this root, that the king sometimes allowed, and sometimes disallowed *Magna Charta*, and *Charta de Foresta.*

4. What should be the remedy that peace and tranquillity might ensue. *Ut cum regnum &c. reformatione legum et jurium quibus pax et tranquillitas incolarum conservetur indigeat, ad quod remedium salubre per ipsum regem et suos fideles provisiones, ordinationes, et statuta subscripta, ab omnibus regni suis incolis tam majoribus quam minoribus firmiter et inviolabiliter temporibus perpetuis statuerit observari.*

This remedy that should for ever in all future times be inviolably observed, consisted upon two parts.

1. For establishing of *Magna Charta*, and *Charta de Foresta*, whereof more shall be said when we come to the first chapter. In the meane time, this is to be observed, that after this parliament neither *Magna Charta*, nor *Charta de Foresta*, was ever attempted to be impugned or questioned: whereupon peace and tranquillity, whereof this preamble speaketh, have ever since ensued.

2. For enacting of new lawes, or declaring of old, with addition of great punishment.

C A P. I.

CUM autem tempore turbationis nuper in regno Angliæ subortæ, et deinceps multi magnates et alii iustitiam indignati fuerint recipere per dominum regem, et curiam suam, prout debuerunt, et consueverunt temporibus prædecessorum ipsius domini regis, et etiam tempore suo: sed de vicinis suis, et aliis per seipsos graves ultiones fecerint, et distractiones, quousque redemptiones reciperent ad voluntatem suam. Et præterea quidam eorum, se per ministros domini regis iustificari non permittant, nec suslineant quod per ipsos liberentur distractiones, quas autoritate propria fecerint

WHEREAS at the time of a commotion late stirred up within this realm, and also sithence, many great men, and divers other, refusing to be justified by the king and his court, like as they ought and were wont in time of the king's noble progenitors, and also in his time; but took great revenges and distresses of their neighbours, and of other, until they had amends and fines at their own pleasure; and further, some of them would not be justified by the king's officers, nor would suffer them to make delivery of such distresses as they

*fecerint ad voluntatem suam. Provisum est, concordatum et concessum, quod tam majores, quam minores, justitiam habeant et recipiant (1), in curia domini regis (2). Et nullus de cætero ultiones, aut distractiones faciat per voluntatem suam (4), absque consideratione curiæ domini regis (3), si forte dampnum vel injuria sibi fiat, unde emendas habere voluerit de aliquo vicino suo, sive majore sive minore. Super articulo autem supradicto provisum est et concessum, quod si quis de cætero ultiones hujusmodi capiat per voluntatem suam propriam absque consideratione curiæ domini regis (ut prædictum est) et inde convincatur, puniatur per redemptionem (5), et hoc secundum quantitatem delicti. Et similiter * si vicinus super vicinum suum faciat distractionem sine consideratione curiæ domini regis, per quod dampnum habeat, puniatur eodem modo, et hoc secundum quantitatem delicti. Et nihilominus fiant emendæ plene et sufficienter eis, qui dampna sustinuerunt per hujusmodi distractionem.*

they had taken of their own authority: it is provided, agreed, and granted, that all persons, as well of high as of low estate, shall receive justice in the king's court; and none from henceforth shall taken any such revenge or distress of his own authority, without award of our court, though he have damage or injury, whereby he would have amends of his neighbour either higher or lower. And upon the foresaid article it is provided and granted, that if any from henceforth take such revenges of his own authority, without award of the king's court (as before is said) and be convicted thereof, he shall be punished by fine, and that according to the trespass. And likewise if one neighbour take a distress of another without award of the king's court, whereby he hath damage, he shall be punished in the same wise, and that after the quantity of trespass. And nevertheless sufficient and full amends shall be made to them that have sustained loss by such distresses.

* [103]

(Mert. cap. 11. 12 Rep. 13. 11 H. 4. 2. 17 Ed. 3. 9. 2 Inst. 162.)

This first chapter consisteth of a preamble, and the body of the act.

The preamble shews the mischiefs, which were foure.

1. That in the time of the late troubles, great men and others refused to be justified by the king and his court, as they ought, for here it is said, *multi magnates et alii indignati fuerint recipere justitiam per dominum regem, et curiam suam.*

2. *Sed graves ultiones fecerint*, That they (refusing the course of the kings lawes) tooke upon them to be their owne judges in their owne causes, and to take such revenges as they thought fit, untill they had ransomes at their pleasures. *Aliquis non debet esse judex in sua propria causa.* *Regula.*

3. That some of them would not be justified by the kings officers.

4. Nor would suffer them to make delivery of such distresses, as they had taken of their owne authority at their pleasure. Here you may see the defects of a disordered and troubled state.

The body of the act consisteth of divers branches.

First, a remedy in generall for all the said mischises.

(1) *Provisum est, concordatum, et concessum, quod tam majores quam minores, justitiam habeant et recipiant in curia domini regis.* This is the golden met wande, that the law hath appointed to measure the cases

8 H. 4. 19. Gasc.
24 H. 8. cap. 12.
25 H. 8. cap. 21.

cases of all and singular persons, high and low, to have and receive justice in the kings courts; for the king hath distributed his judicial power to severall courts of justice, and courts of justice ought to determine all causes, and that all private revenges bee avoided.

Upon this generall law, foure conclusions doe follow.

1. That all men, high and low, must be justified, that is, have and receive justice in the kings courts of justice.

See cap. Itineris,
Artic. ult.

2. That no private revenge be taken, nor any man by his owne arme or power revenge himselfe: and this article is grounded upon the law of God, *vindicta est mihi et ego retribuam*, saith Almighty God. All revenge must come from God, or from his lieutenant the king, in some of his courts of justice.

3. That all the subjects of the realme ought to be justified, that is, submit themselves to the kings officers of justice according to law.

4. That they ought to suffer replevies to be made according to the law, to the end that men may possesse their horses, beasts, and other cattle and goods in peace, whereof they have so great and continuall use. See hereafter cap. 4.

(2) *In curia domini regis.*] These words are of great importance, for all causes ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, whither all persons may resort; and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court, where the parties counsell and attorneys attend, ought orders, rules, awards, and judgements to be made and given, and not in chambers or other private places, where a man may lose his cause, or receive great prejudice, or delay in his absence for want of defence. Nay, that judge that ordereth or ruleth a cause in his chamber, though his order or rule be just, yet offendeth he the law, (as here it appeareth) because he doth it not in court. And the opinion is good, and agreeable to this law, *qui aliquid statuerit parte inaudita altera, æquum licet statuerit, haud æquus fuerit*: Neither are causes to be heard upon petitions, or suggestions and references, but in *curia domini regis*.

[104]

Seneca.

(3) *Et nullus de cætero ultiones aut districciones faciat per voluntatem suam absque consideratione curiæ domini regis.*] The first clause was affirmative: this clause, for the more surety, is in the negative.

(4) *Districciones faciat per voluntatem suam.*] That is, taking distresses not according to the law, as for services, rents, or for damage feasant, or for other lawfull cause, but for revenge without cause, of his owne head and will, that is, to be his owne judge and carver, to satisfie himselfe without any lawfull meane or course of law, and so it is to be understood through this whole chapter: for this chapter is to be understood *de ultionibus*, of revenges, which are of two natures, 1. personall, as by combat, imprisonment, and the like: 2. By distresses, that is, revengefull taking of goods. Concerning takings in nature of distresses, provision is made in the next three chapters.

(5) *Puniatur per redemptionē.*] For this word (*redemptio*) and the signification thereof, see the first part of the Institutes, sect. 194.

1 part Institutes, sect. 194.
Here, cap. 4.

CAP.

CAP. II.

NULLUS *insuper major* (1) *vel minor distringat aliquem ad veniendum ad curiam suam, qui non sit de feodo suo, aut super ipsum non habeat jurisdictionem per hundredum, wapentagium, vel baliivam* (2), *quæ sua sit nec distributiones faciat extra feodum suum, seu locum ubi baliivam habeat, vel jurisdictionem. Et qui contra hoc statutum fecerit, puniatur eodem modo, et hoc secundum delicti quantitatem, et etiam qualitatem.*

MOREOVER, none (of what estate soever he be) shall distrain any to come to his court, which is not of his fee, or upon whom he hath no jurisdiction, by reason of hundred, or bailiwick; nor shall take distresses out of the fee or place where he hath no bailiwick or jurisdiction: and he that offendeth against this statute, shall be punished in like manner, and that according to the quantity and quality of the trespass.

(Fitz. Barre, 281.)

(1) *Nullus insuper major, &c.*] This chapter concerning distresses enacteth three things: 1. That no man shall distress any to come to his court but such as be within his fee: this is intended of suit service in respect of a feignory, and not of suit reall in respect of resistance. 2. Or that he hath jurisdiction by hundred, wapentake, or bayliwick. 3. That he shall not take distresses out of his fee or place where he hath a bailiwick or jurisdiction.

This chapter is a declaration of the common law, saving for the penaltie hereby inflicted; and therefore if A. distresse B. and in a replevie A. avow as lord for rent or service, B. plead *hors de son fee*, and it is found for B. A. shall not in this replevy be punished by ranfome, &c. according to this act, but hee must have an action upon this statute, *et sic de similibus*.

(2) *Infra baliivam.*] Here *baliiva* is well expounded by the statute it selfe, for it signifieth here jurisdiction, and therefore it is here said, *infra baliivam seu jurisdictionem*.

Fleta, li. 2. ca. 40.
W. 1. cap. 16.
Here, cap. 15.
Artic. cler. c. 6.
Artic. super cart. cap. 12.

41 E. 3. 26.
47 E. 3. 7.

[105]

Regist. 97.
4 E. 3. 1.
19 E. 3. Barre 281.
19 E. 2. breve 842.

11 R. 2. Avow. 87. 18 E. 2. Action sur le stat. 85. F.N.B. 89, 90.

CAP. III.

SI *quis autem major vel minor permittere noluerit liberari per ministros domini regis, secundum legem et consuetudinem regni, distributiones quas fecerit: aut etiam sustinere noluerit summonitiones, attachiamenta, executiones judiciorum curiæ domini regis fieri secundum legem et consuetudinem regni ut prædict' est puniatur modo prædicto,*

IF any, of what estate soever he be, will not suffer such distresses as he hath taken, to be delivered by the king's officers, after the law and custom of the realme, or will not suffer summons, attachments, or executions of judgments given in the king's court, to be done according to the law and custom of the realm, as is aforesaid,

prædicto, tanquam se justiciari non permittens, et hoc secundum delicti quantitatem. Et si quis major vel minor districtiones faciat super tenentem suum pro servitiis et consuetudinibus, quæ sibi deberi dicat, vel pro re altera, unde ad dominum feodi pertineat districtiones facere, et postea convincat, quod tenens ea sibi non debeat: non ideo puniatur dominus per redemptionem, ut in supradictis casibus, si permittat districtiones deliberari secundum legem et consuetudinem regni, sed amercietur, velut hactenus consuetum est, et tenens dampna sua recuperet versus eum.

aforesaid, he shall be punished in manner aforesaid, as one that will not obey the law, and that according to the quantity of the offence. And if any, of what estate soever he be, distrain his tenant for services and customs being due unto him, or for any other thing, for the which the lord of the fee hath cause to distrain, and after it is found that the same services are not due, the lord shall not therefore be punished by fine, as in the cases aforesaid, if he do suffer the distresses to be delivered according to the law and custom of the realm; but shall be amerced as hitherto hath been used, and the tenant shall recover his damages against him.

W. 1. cap. 17. (Bro. Trespafs, 16, 384. 5 H. 7. c. 9.)

This chapter consisteth on three branches.

Regist. 97.

1. That all of what estate soever, shall suffer such distresses as have been taken to be delivered by the kings officers after the law and custome of the realme. But if any will not suffer them to be delivered, it is no good returne for the sheriffe to say, that he was resisted, for he may take *posse comitatus*.

2. That all shall suffer summons, attachments, or executions of judgements in the kings court, &c.

44 E. 3. 20. li. 4.

fol. 11.

Bevils case. li. 9.

fo. 76.

Combes case.

3. If the lord distress his tenant for customes, services, or any other duty, which the lord alledged to be behinde, if it be found that it is not behinde, *non puniatur dominus per redemptionem, &c.* But at the common law an action of trespassse *vi et armis* in that case did lie.

This branch is interpreted that the lord shall pay no fine, and therefore since this act by a consequent no action of trespassse *quare vi et armis* lieth against the lord in this case, for then he should pay a fine.

41 E. 3. 26.

44 E. 3. 13.

28 E. 3. 97.

8 E. 4. 15.

10 E. 4. 7.

20 E. 4. 3.

21 E. 4. 3.

2 H. 4. 4.

11 H. 4. 78.

1 H. 6. 6.

9 H. 7. 14.

Combes case.

ubi supra.

9 H. 6. 20.

44 E. 3. 13.

19 R. 2.

Heriot 5.

The former chapters inflict punishment, where the distresse is unlawfull, for that he that distrained had no seigniory or jurisdiction at all, or distrained out of his fee or jurisdiction, &c. But in this last branch, he which distrained had a lawfull seigniory, and distrained within his fee and seigniory, and so this case differeth from the other, (although in truth nothing was behinde.) But this * is to be intended where the lord himselfe doth distrain; for if his baylie take a distresse, where nothing is behinde, there an action of trespassse, *quare vi et armis* lieth against him, because the baylie is not *dominus*; and so it is against a gardien in socage. And if the lord himselfe doth cut any wood, or break the house, or feed the ground of his tenant, or the like, which he doth not in respect of his seigniory, there an action of trespassse, *quare vi et armis* lieth against him, for he doth not these things as *dominus*.

And

* [106]

And (*dominus*) in this act is extended to the lessor upon a lease for life, or for yeares made, for the lessee for yeares shall doe fealty also; but if the lessor put out the lessee for yeares, or disseise the tenant for life, or doe any act, not as *dominus*, the lessee shall have an action of trespassse against him, *vi et armis*.

48 E. 3. 5, 6.

28 E. 3. 97.

38 E. 3. 33.

5 H. 7. 10.

CAP. IV.

NULLUS de cætero faciat ducere districtiones quas fecerit extra comitatum in quo capte fuerint. Et si vicinus hoc fecerit super vicinum suum, et per voluntatem suam, et sine iudicio, puniatur per redemptionem ut supra, veluti de re facta contra pacem. Veruntamen si dominus hoc super tenentem suum facere præsumserit, castigetur per gravem misericordiam. Districtiones insuper sint rationabiles, et non nimis graves. Et qui districtiones fecerint irrationabiles, et indebitas, graviter amercientur propter excessum (1) districtionum ipsarum. Vide statut. anno 1 & 2 Phil. & Mar. cap. 13.

NONE from henceforth shall cause any distress; that he hath taken, to be driven out of the county where it was taken; and if one neighbour do so to another of his own authority, and without judgement, he shall make fine (as above is said) as for a thing done against the peace: nevertheless, if the lord presume so to do against his tenant, he shall be grievously punished by amerciamment. Moreover, distresses shall be reasonable, and not too great. And he that taketh great and unreasonable distresses, shall be grievously amerced for the excess of such distresses.

W. 1. c. 16. (Fitz. Bar. 120, 275. 29 Ed. 3. c. 23. Kel. 50. 1 & 2 P. & M. c. 12. 28 Ed. 1. Stat. 3. c. 12.)

This chapter emptieth itselfe into five parts, viz.

1. That none shall drive any distresse out of the county, where he hath taken it.

2. If one neighbour doe so to another, (as for damage fesant, or rent charge) of his owne authority, he shall make ranfome, that is a fine, as of a thing done against the peace.

3. If the lord presume to doe it against his tenant, he shall be punished by a great amerciamment.

At the common law a man might have driven the distresse to what county he would, which was mischievous for two causes:

1. Because the tenant was bound to give the beasts being impounded in an open pound sustenance, and being carried into another county, by common intendment he could have no knowledge where they were. Another cause, he could not know where to have a replevy, but the party was before this statute driven to his action upon his case; and albeit this statute be in the negative, yet if the tenancy be in one county, and the mannor in another county, the lord may drive the distresse which he taketh in the tenancy to his mannor in the other county, for that the tenant is out of both the said mischiefs; for the tenant by doing of suite and service to the mannor, by common intendment may know what is done there, and therefore may give his beasts sustenance; and to know where to have his

6 H. 3. Avow.

242.

Temps E. 1.

ibid. 192.

30 Aff. 38.

29 E. 3. 13.

1 H. 6. 9.

22 E. 4.

Barre 120.

F.N.B. 89.

Pl. Com. 9. b.

his replevy, the bayliffe of the mannor usually drive the cattell distrained to the pound of the mannor; and this act extends as well to goods as to beasts: note here by a case out of the mischiefs is out of the meaning of the law, though it be within the letter.

Registr. 97.
1. pt. Inst. sect.
69.
29 E. 3. 23.
42 E. 3. 26.
11 H. 4. 2.
8 H. 4. 16.
29 E. 23.

4. That distresses be reasonable, and not too great: vide the first part of the Institutes, what shall be said reasonable, and by whom it shall be tried in this and in all other cases: some say that for homage, or fealty, for the expences of the knights of the parliament an excessive distress cannot be taken; but this statute is generall, and extendeth unto all.

5. He that takes unreasonable and undue distresses, shall be grievously amerced for the excesse of those distresses.

Stat. 51 H. 3.
W. 1. c. 16.
28 E. 1. c. 12.
1 & 2 Phil. &
Mar. c. 12.

It is worthy of observation, how provident the makers of these and other statutes be, that mens beasts, cattell, or other goods be not unjustly or excessively distrained; and if they be, that deliverance be speedily made of them by replevy, otherwise the husbandry of the realme, and mens other trades might be overthrowne or hindred: and this agreeth with the reason of the common law.

7 E. 3. 8. b.
20 Ass. 38.
13 H. 4. 17.
14 H. 4. 4.
Lib. 8. fol. 147.
le 6. Capen-
ters case. li. 5.
fo. 76.
Pilkingtons case.

And therefore if the lord or his bayliffe come to distraine the beasts or goods of his tenant for his rent behinde, before the distresse the tenant (that he may keep and use his beasts or other goods) may upon the land tender the arrerages, and if after that a distresse be taken, it is wrongfull: and if the lord have distrained, if the tenant before the impounding of them tender the arrerages, the lord ought to deliver the distresse, and if he doth not, the detainer is unlawfull: even so it is in case of a distresse for damage feasant, the tender of amends before the distresse, maketh the distresse unlawfull, and after the distresse, and before the impounding, the detainer unlawfull. But if a man bring an action of trespassse for taking away his beasts or other goods, there tender of such sufficient amends before the action brought is no barre, because he that tendred the amends is not the owner of the goods; as in the other cases, but a trespasser, whom the law favoureth not: and further, if the avowant hath retourned irreplicable, yet if the owner of the beasts or goods tender to him all that is due upon the judgement in the avowry (whereby the certainty doth appeare) he may have an action of detinue for the detainer afterward, or upon satisfaction made in court, have a writ for their delivery.

21 H. 7. 30. a.
But this is now
holpen by the
Statute of 21
Jac. cap.
13 H. 4. 4. a.
33 H. 6. 27. a.
45 E. 3. 9.

50 H. 3. distr.
de Scaccar. acc.

(1) *Distractiones sunt insuper rationabiles et non minus graves, &c. propter excessum, &c.* *Quicquid in excessu actum est, lege prohibetur.*

Registr. 97.
22 E. 4. 26.
11 H. 4. 2.
8 H. 4. 16.
F.N.B. 89.

For example, if the lord distraine two or three oxen for xij. d. or the like small summe, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the twelve pence, &c. of his owne shewing hee shall make fine, &c. or the party may have his action upon the statute.

If the lord distraine an ox, or horse for a penny, if there were no other distresse upon the land holden, the distresse is not excessive, but if there were a sheepe or swine, &c. then the taking of the ox or horse is excessive, because he might have taken a beast of lesse value.

CAP. V.

MAGNA Charta (1) in singulis suis articulis teneatur, tam in his quæ ad regem pertinent, quam quæ ad alios (2), et hoc coram justiciariis itinerantibus (3) in suis itineribus, et vicecomes in comitatibus suis, cum opus fuerit demandetur, et breviam versus eos qui contravenierint gratis concedantur (4) coram rege (5), vel coram justiciariis de banco, (6), vel coram justiciariis itinerantibus, cum in partes illas venerint. Similiter Charta de Foresta in singulis suis articulis teneatur (7), et contravenientes per dominum regem, cum convicti fuerint graviter puniantur modo supradicto.

THE great charter shall be observed in all his articles, as well in such as pertain to the king, as to other; and that shall be enquired afore the justices in eyre in their circuits, and afore the sheriffs in their counties, when need shall be. And writs shall be freely granted against them that do offend, before the king, or the justices of the bench, or before justices in eyre, when they come into those parts. Likewise the charter of the forest shall be observed in all his articles, and the offenders when they be convict, shall be grievously punished by our sovereign lord the king in the form above mentioned.

(15 E. 4. 13)

This, as hath beene said, was one of the principall causes of the summons of this parliament, and after this ensued great and constant peace and tranquillity.

And where some have thought, that *Magna Charta* had not the strength of a parliament before this act, how they mistake it, you may reade before in *Magna Charta*, cap. 32, and 38. Magna Charta, c. 32, 38.

(1) *Magna Charta.*] By this time this charter had got the name of *Magna Charta*, and by that name onely is here confirmed.

(2) *Tam in his quæ ad regem pertinent quam ad alios.*] These be short and effectually words, and to avoid all scruples, the king is expressly named, and it hath not words of confirmation, but words of establishment, *Quod Magna Charta in singulis suis articulis teneatur*, which is the surest way.

(3) *Coram justiciariis itinerantibus.*] Vide cap. *itineris*, the articles of *Magna Charta* especially given in charge, and enquired of, &c. by justices in eyre, and by this act they had their authority therein. Cap. Itineris. Vet. Mag. Cart. 150. b.

(4) *Brevia gratis concedantur.*] Writs against the breakers of *Magna Charta* shall be freely granted, to encourage such as would pursue against them. Mag. Cart. c. 29.

(5) *Coram rege.*] That is, in the kings bench.

(6) *Coram justiciariis de banco.*] That is, in the court of common pleas.

(7) *Similiter charta de foresta, in singulis suis articulis teneatur, &c.*] This was another of the principall causes of the summons of this parliament, as hath been said.

CAP.

C A P. VI.

DE his autem qui primogenitos, et hæredes (1) suos infra ætatem existentes (2) feoffare solent de hæreditate sua (3), ut per hoc amitterent domini feodorum custodias suas, provisum est, concordatum, et concessum, quod occasione hujusmodi falsi feoffamenti, nullus capitalis dominus amittat custodiam suam. De his insuper qui de terris suis (4), quas tradere voluerint ad terminum annorum (5), ut per hoc domini feodorum amittant custodias suas, falsa fingunt feoffamenta continentia, quod eis satisfactum est de summa servitii in illis contenti usque ad terminum aliquem: ita quod si ad dictum terminum solvere tenentur hujusmodi feoffati summam aliquam ad valorem terrarum illarum, vel in multo excedentem, ut sic post terminum illum terra eorum revertatur ad ipsos vel ad hæredes suos, eo quod nemo eam pro tanto tenere curaret: provisum est, concordatum, et concessum, ut per hujusmodi fraudem nullus capitalis dominus amittat custodiam (6) suam: veruntamen non licebit eis hujusmodi feoffatos sine iudicio disseisire (7): sed breve habeant de hujusmodi custodia sibi reddenda (8), et per testes in chartis (9) ne hujusmodi feoffamento contentos, una cum aliis liberis et legalibus hominibus de patria, et per quantitatem et valorem tenementi, et per quantitatem summæ, quæ inde reddi debeant post terminum prædictum attingatur, utrum hujusmodi feoffamenta bona fide facta sint, an in fraudem, ad auferendum capitalibus dominis feodorum custodiam suam. Si vero capitales domini per iudicium curia in hujusmodi casibus recuperaverint custodiam suam, salva sit nihilominus hujusmodi feoffatis actio sua, quo ad terminum, seu ad feudum recuperandum, quam inde habuerint cum hæredes ad legitimam ætatem per-

AS touching them that use to infeoff their eldest sons and heirs, being within age, of their heritage, for to defraud the lords of the fee of their wardships, it is provided, accorded, and agreed, that by occasion of any such feoffment no chief lord shall leese his ward. Moreover, touching them that fain false feoffments of their lands, which they will lease for term of years, for to defraud the chief lords of their wards, wherein it is contained, that they are satisfied of the whole service due unto them until a certain term; so that such feoffees are bound at the said term to pay a certain sum to the value of the same lands, or far above; so that after such term the land shall return unto them, or to their heirs, because no man will be content to hold it upon the price; it is provided and agreed, that by such fraud no chiefe lord shall leese his ward. Nevertheless, it shall not be lawful to them to disseise such feoffees without judgement, but they shall have a writ for to have such a ward restored unto them; and by the witnessies contained in the deed of feoffment, with other free and lawful men of the country, and by the value of the land, and by the quantity of the sum payable after the term, it shall be tryed whether such feoffments were made bona fide, or by collusion, to defraud the chief lords of the fee of their wards. And if the chief lords in such cases recover their wards by judgement, the feoffees shall nevertheless have their action to recover such term or fee, which they had therein, when the heirs come to their lawful age. And if, any chief lords do maliciously implead such feoffees, faining this case

pervenerint. Et si aliqui capitales domini feoffatos aliquos malitiosè implacitaverint, fingentes casum istum, maxime ubi feoffamenta legitimè et bona fide facta fuerint (11), tunc adjudicentur feoffatis dampna sua, et misce sue (10), quas fecerint occasione præd' placiti, et ipsi actores per misericordiam graviter puniantur.

case, namely, where the feoffments were made lawful, and in good faith, then the feoffees shall have their damages awarded, and their costs which they have sustained by occasion of the foresaid plea, and the plaintiffs shall be grievously punished by amercia-ment.

(34 & 35 H. 8. c. 5. 1 Roll 91. 2 Roll 106, 134. Godbolt 78. pl. 92. Fitz. Gard. 79, 102, 155. 6 Rep 76. Dyer 9. 27 H. 8. 2. Fitz. Gard. 33. Fitz. Collusion, 12, 14, 29, 36, 47. 11 Rep. 77. Fitz. Gard. 119. Fitz. Brief, 779. 19 H. 6. f. 30. Ejectione custodiæ, Co. Ent. 183. Regist. 161. 4 H. 7. c. 17.

Robert Walrand penned and preferred this act, and by aid and common assent of the great lords of the realme, obtained to passe it for a statute. This Robert Walrand was learned in the lawes of the realme, and soone after this statute, died: his son and heire conveyed his lands holden by knights service to his son and heire apparent, being within the age of 21 yeares, rather trusting his land in his son within age, then in himselfe, and died, his son being still within age; and this statute which Robert Walrand the grandfather had penned and preferred, took first effect in the heire of his heire, as Britton reporteth.

The mischief before this first branch of this statute was, that such a feoffment as well in the kings case, as in the case of a common person, did take away the wardship of the heire, as it appeareth by the preamble, and our books, because by the common law the heire could not be in ward, unlesse he were in by descent, and tenant by knights service to prevent the lord of the wardship, would enfeoffe him or her to whom the land should descend by the common law. And upon this statute collusion of this kind was divided into two branches; the first was called 'collusion apparent, upon this first branch, *qui primogenitos feoffare solent*; the second was called collusion averrable, that is to be proved upon issue thereupon to be taken upon the second branch, *De hiis in super qui de terris suis, &c.*

(1) *Qui primogenitos et hæredes.*] Albeit the heire be not *primogenitus*, but an heire female, or male lineall or collaterall, yet every of them is within the same mischief; and therefore the auncient sages of the law (that I may say it once for all) did ever apply the remedy to the mischief; and therefore here this (*et*) a conjunctive, was by construction taken for a disjunctive, *viz. qui primogenitos vel hæredes, &c.*

If a tenant by knights service of land of the nature of borough-english infeoffe his youngest sonne, he is within this statute; for *hæres dicitur ab hæreditate, et sic se similibus.*

(2) *Infra ætatem existentes.*] This branch extends not to give remedy for relieves which is due when the tenant dieth, his heire of full age; but by divers statutes of later time provision is made for reliefe. And thus much concerning the person to be infeoffed within this first branch.

(3) *Feoffare solent de hæreditate sua.*] 1. * This word *feoffare* implyeth a fee-simple, and therefore if the auncestor had made a lease

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Brit. c. 36. fo. 95. b.

9 H. 4. 6.
33 H. 6. 15. b.
Lib. 6. fo. 76.
Sir Geo. Cursons case.
17 E. 3. reliefe 3.33 H. 6. 16.
Pl. com. 82.Rot. clauf. an. 2.
E. 1. m. 14.
Pl. com. ubi sup.
Hil. 16 E. 1. in Banco. Rot. 51.
Norf. Johannes de Brampton.9 H. 4. 6.
See the stat. of 34 H. 8. c. 15. versus finem.
13 Eliz. cap. 5.
17 E. 3. 63. relief 3.31 E. 3. tit. collusion 29.
7 E. 3. tit. rel. 11.
4 E. 3. 22.a 1. Part Instit. 1. sect. 1. for this word *feoffare*.
33 H. 6. 14.
27 H. 8. 10.

lease for life, or a gift in taile to his heire apparent with a remainder or without a remainder over of the estate in taile, it was out of this statute.

^b 31 E. 1.
collu. 29.
33 H. 6. 14.

2. ^b This act speaketh of a feoffment made solely to the heire; and therefore if a feoffment had beene made to the heire and an estranger, though the fee-simple were limited to the heires of the heire, yet it was out of this act.

^c 33 H. 6. ubi
sup.

3. ^c And this is to be understood of an immediate gift to the heire apparent; for if a lease for life be made, the remainder to the heire apparent in fee, this is no collusion.

4. Though it was not a feoffment, but inured by way of graunt; as if the mesne had graunted his mesnaltie to his heire, or if the tenant or mesne had levied a fine, or suffered a recovery by consent, or had made a lease and release, or confirmation, or the like, such conveyances had beene in equall mischief, and therefore within the remedy.

27 H. 8. 8. b.

5. This act extended not to a feoffment to the use of his heire, or to the use of himselfe and his heires; for at the common law the lord should not have the wardship but of the heire of his tenant, that died in his homage, and therefore the statute of 4 H. 7. cap. 17. was made to remedy this mischief.

33 H. 6. 16.
l.b. fo.
H.m. Stranges
case, and Por-
ruges case.

[III]

6. If the eldest son within age purchase of his father the lands holden by knights service for valuable consideration, *bona fide*, by feoffment or other conveyance, this is within the letter, but not within the meaning of this statute, no more then if he had sold the land to any other.

13 H. 7. 7.

27 H. 8. 9.

7. If *cestuy que use* after the statute of 4 H. 7. cap. 17. and before the statute of 27 H. 8. cap. 10. of uses, had enfeoffed his eldest son, this was taken within the equitie of this ancient act.

33 H. 6. 16.

8. When shall this feoffment be upon this act deemed to be by collusion? The answer is, after the decease of the auncester, for then the title of wardship accrues, and not in his life time.

33 E. 3. gar. 12.
31 E. 1. ibid.
155.
32 E. 3. ibid. 33.
33 H. 6. 16.
Tr. 7 Jac. li. 8.
fo. 164. Might's
case.

9. If the lord accept homage of the heire apparant (after the feoffment made to him by his auncester) in the life of the auncester, he shall not have the wardship, because he allowed him to be his tenant.

10. But at this day, albeit the father infeoffe his eldest son, or any of his children, though it be found to be made upon collusion, to defeat the king or other lord of wardship, yet the king or other lord shall not have but a third part by the statutes of 32 and 34 H. 8. of Wills. So note this statute altered in part. And thus much of the manner of the feoffment.

(4) *De hiis insuper qui de terris suis, &c.*] This is the second branch of this act concerning collusion averrable, when feoffments are made to strangers, whereof here is an example set downe in this act.

Briton, 95. b.
32 E. 3. gard. 33.
4 E. 2. gard. 119.

(5) *Qui tradere veluerint ad terminum annorum.*] This is to be understood of a feoffment in fee reserving no rent, for that they suppose they are satisfied for a certaine terme, which should end when the heire should come to full age, and then it was conditioned that the feoffee should pay more then the land was worth, and thereupon the heire entred, for that none would give so great a price.

47 E. 3. 19.
32 E. 3. gard. 33.
8 R. 2. collu. 47.

(6) *Per hujusmodi fraudē nullus capitalis dominus amittat custodiam.*] By such fraud, that is, such in mischief, or such in inconveniencie,

conveniencie, and therefore all other fraudulent feoffments tending to the same end are within this statute, whatsoever colourable pretext they have, and so is this word [such] oftentimes taken in other statutes. It is the opinion of Huls justice, and of Gascoine chiefe justice of England, that by the words and purview of this statute, it holdeth only betweene lord and tenant; and therefore if a man hold land by knights service in *capite* of the king; and other land of a subject by knights service, and maketh a feoffment by collusion of the land holden of the subject, and dieth, his heire within age, the king shall not take advantage of this stat. for he is not *dominus* of this land; but in this case the king is relieved by the stat. of 34 H. 8. c. 5. *versus finem ejusd. actus.*

9 H. 4. 6.

(7) *Veruntamen non liceat hujusmodi feoffatos sine judicio disseisire.* *Hujusmodi feoffatos*, such feoffees. And yet the feoffees of the feoffees upon the same collusion are taken to be within this statute; but if the feoffees in the life of the auncestor make a feoffment in fee *bona fide*, and then the tenant dieth, his heire within age, the lord shall not have any action upon this statute, for that the collusion continued not untill the death of the tenant; but if the tenant had died, his heire within age, and then the feoffees had infeoffed others *bona fide*, yet the lord shall recover the wardship, because the lord by the death of his tenant was once intitled to his action; but yet in some cases the lord shall enter upon the feoffee.

33 H. 6. 16.

31 E. 3. gard. 29.

If the tenant infeoffe a stranger upon collusion, and that stranger infeoffe the heire in the life of the tenant, and then the tenant dieth, the lord may enter upon the heire, because no writ of right of ward lyeth against the heire; and therefore the lord shall enter upon the heire, being feoffee: for otherwise he should be without remedy, the words of the writ of ward being *Præcipe A. quod reddat B. custodiam terræ et hæredis C. quæ ad ipsum B. pertinet, &c.* so as this writ is ever brought against a stranger.

33 H. 6. 16.

F.N.B. 139.

If the tenant infeoffe the villein of the lord upon collusion, and dieth, his heire within age, the lord shall enter upon this feoffee; for if the lord should be driven to his action against the villein, it should amount to an enfranchisement; and statutes must be so construed, as no collaterall prejudice grow thereby.

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Also the heire of the feoffee is within this statute; and if the feoffee dieth, his heire within age, the lord shall have his writ of ward against the heire, who shall not have his age, but the lord shall recover against him by this act.

18 E. 3. covenant

7.

The statute saith, *feoffatos*, and yet conusees of fines, and all other conveyances are within this statute.

7 H. 4. 15.

12 H. 4. 16.

1 Part Instit.
sect. 472.

And here it appeareth, that the ancient law did ever favour him that came by title, and put him that right had to his action.

If the father had made a feoffment for the maintenance and livelihood of his wife, preferment of his daughters, or of his younger sons, or for the payment of his debts, and after had infeoffed his heire apparent, this was holden no collusion; for every man by the law of God and nature, ought to provide for his wife and children, and he is worse then an infidell that doth not provide for his family: and by the law of God and of nations debts ought to be paid: *Nemini quicquam debeatis, nisi quod invicem diligatis.*

33 H. 6. 14.

Dier 10 El.

260.

3 Eliz. 193.

20 Eliz. 361.

19 Eliz. 276.

5 Mar. 158.

Lib. 6. fo. 76.

Sir Geo. Cursons case.

* Now by the said statutes of 32 and 34 H. 8. where the tenant by knights service doth infeoffe others to any of these three in-

* See Sir Geo.
Cursons case
ubi supra.

tents, viz. for the livelihood of his wife, preferment of his children, or payment of his debts, the heir shall be in ward for his body, and for the third part of his lands so conveyed, whereby the common law was changed in that behalf.

27 H. 8. 10.
4 H. 7. c. 10.

Of lands holden by knights service deviseable by custome, no collusion could have been averred upon a devise by will; the same law, if *cessuy que use* had devised the use by will; but now that is altered by the statute of 34 H. 8. c. 5.

39 E. 3. 33. 34.

4 E. 2. gard. 119.
32 E. 3. ibid. 33.
12 H. 4. 13. b.
4 H. 7. 10
F.N.B. 143. k.

(2) *Breve habeat de hujusmodi custodia reddenda.*] This writ is a writ of right of ward, and when the lord hath recovered the wardship against the feoffee, the freehold and inheritance is left in the feoffee, and not restored to the heir, and therefore if the gardein commit waste, the same is dispunishable, for the feoffee cannot have an action of waste against the gardein in this case. And the lord upon this statute could not seize the body of the heir, or have a ravishment of ward, before he had recovered the land in a writ of right of ward, for therein ought the collusion be first tried, because unlesse that were found according to this statute, there is no cause of wardship by this act.

34 H. 8. c. 5.
versus finem.
13 El. c. 5.

12 E. 2. c. 2.
1. Part Instit.
sect. 1.

(9) *Et per testes in cartis.*] Note, the deed is not here denied, and yet proces to be awarded against the witnesses. For this see the first part of the Institutes. *Vide postea, cap. 14.*

(10) *Adjudicentur feoffatis damna sua et mixta sue.*] This is the first statute that gave the defendant damages and costs if it were found for him, and the lord to be grievously amerced, and many other statutes have followed this example: and where this statute saith (*malitiose*) *implacitaverint*, if the matter be fained, and without just ground, the law implyeth malice in this case.

(11) *Fingentes casum istum maximè ubi feoffamenta legitima et bona facta fuer.*] There is no greater injustice, then when under colour of justice injury is done.

Regula.

Multi litigant in foro, non ut aliquid lucrentur, sed ut vexent alios. Therefore justly did this act, which gave an action in a new case, give damages and costs to the defendant, if he were maliciously vexed thereby without good cause.

[113]

C A P. VII.

IN placito vero communi de custodiis (1), si ad magnam distractionem non venerint desorciatores (3), tunc bis vel ter iteretur breve prædictum ad terminos quibus fieri poterit, infra medietatem anni sequentis, ita quod singulis vicibus legat' breve in pleno comitatu nisi al' ubi prius inventus fuerit desorciator. Et ibi publicè denunciatur, ut veniat ad diem sibi præfixum. Quod si ipse extunc se subtraxerit, ita quod infra medietatem anni prædictæ responsurus non venerit, nec vicecomes eum invenire

IN a plea of communi custodia, if the desorceors come not at the great distress, then the said writ shall be renewed twice or thrice, at such terms as it may be done within the half year following, so that every time the writ shall be read in the open county (if the desorceor be not found before) and there openly be proclaimed, that he may come at the day limited: so that if he absent himself then, and come not to answer within the said half year, nor the sheriff cannot get his

invenire possit (5), per quod corpus suum habere non possit (4), coram justiciariis (6), ad respondendum secundum legem et consuetudinem regni, tunc (tanquam rebellis, et se justiciari non permittens) amittat seisinam hujusmodi custodiæ (2), salva sibi alias actione sua, si forte jus habeat ad eandem. In casibus autem ubi custodiæ pertinent ad custodes (7), hæredum infra ætatem existentium versus custodes illi petatur custodia quæ accidit hæredibus illis tanquam pertinet ad eorum hæreditates: et non amittant hujusmodi hæredes infra ætatem existentes, hæreditatem suam per negligentiam, vel rebellionem suorum custodum, sicut in casu prædicto, sed currat lex communis eodem modo quo prius currere consuevit.

his body, to have it before our justices to answer according to the law and custom of the realm, then as a rebel, and such a one as will not be justified, he shall leese the seisin of his ward; saving to him his action at another time, if he have any right to the same. But in such cases, where the wardships belong to the guardians of wards being within age, and where the guardians demand a wardship which belongeth to the heir, or as appertaining to their inheritance, such heirs within age shall not leese their inheritance by the negligence or rebellion of their guardians, as in the case afore rehearsed; but let the common law run in like manner as it hath been accustomed to do.

(13 Ed. 1. stat. 1. c. 35. 12 Car. 2. c. 24.)

(1) *In placito communi de custodiis.*] In the common plea of ward, that is, in a writ of right of ward, or in an *ejectment de gard*. 30 E. 3. 10.
24 E. 3. 33.
2 H. 4. 1.

In the chapter going before, remedy was given to the lord for wardship, where there was none due to him by the common law; in this chapter more speedy remedy is given to the lord, as well when the lord hath right by the common law, as by the next precedent chapter.

Before the making of this statute, the proces in the writ of ward was summons, attachment, and distress infinite, and the sheriff would many times returne small issues, and so the lord was greatly delayed, and if the heire came to full age, hanging the writ, the writ abated, which was mischievous.

Now this statute provideth, that if the deforceours come not at the grande distress, that after the returne thereof a distress with proclamation shall be made in the county by fixe moneths, and if hee appeare not, judgement shall be given against him, saving to him his right at another time, *si inde loqui voluerit*: Westminster. 2. cap. 35. prescribeth but three moneths.

In a resummons of gard upon the statute of W. 2. a proclamation shall be awarded upon this statute, for it is in equall mischiefe, but in a ravishment * of gard, no proclamation shall be awarded, for that action is formed, and given by the statute of W. 2. cap. 35. which was but trespassed at the common law.

(2) *Amittet seisinam hujusmodi custodiæ.*] If the defendant in a writ of ward make default at the returne of the distress with a proclamation, judgement shall be given for the plaintife against the deforceour to recover the ward and damages, and have a writ to enquire of the damages; and yet this act saith, that he shall lose the seisin of custody, and speaketh not of damages, but in this action the plaintife should recover damages at the common law.

9 E. 4. 50.
18 E. 3.
scire fac. 10.

9 E. 3. 15.
3 H. 4. 45.
16 E. 3. Proclam. 4. 30 E. 3.
10. 14 E. 3. Procl.
8. 16 E. 3.
gard 138.
2 H. 4. 1.
30 E. 3. 10.
22 E. 3. 8.
14 E. 3.
Proclam. 7.

* [114]

7 E. 3. 22. 5 E. 3.
Damages 115.
13 E. 3. Judgement 138.
24 E. 3.
Damages 5.
24 E. 33.
4 E. 3. 26.

K 3

In

17 E. 3. 70.
14 H. 4. 37.
19 E. 3. Pro-
clam. 5. & 10.

In a writ of ward against two, at the grand distresse one of them appeared, and the other made default, the plaintife prayed a distresse with a proclamation, and it was denied, for the body is not severable, and therefore the plaintife cannot have judgement to recover the moiety of the body, otherwise it is of the land, for that is severable.

29 E. 3. 38.
13 E. 3.
Proclam. 9.
33 E. 3. *ibid.* 19.

(3) *Non venerint deforciores.*] If in a writ of ward, the defendant vouch, no proclamation shall be awarded against the vouchee for two causes. 1. The statute extendeth onely to the suite of the plaintife, and this is the suite of the defendant against the vouchee. 2. The statute provideth that proclamation shall be awarded against the deforceors, and the vouchee is not deforceor.

(4) *Quod corpus suum habere non possit.*] This is to be understood, that there is no default in the sheriffe in retourning of good issues, so as by that meanes he might have his body to appeare, for the sheriffe cannot arrest him.

17 E. 3. 70, 71.

(5) *Nec vicecomes eum invenire non poterit*] This must be understood of the sheriffe in that county, where the originall is brought, for no other sheriffe in another county upon a *testatum*, &c. shall make proclamation, but there proceſſe lieth, as it was at the common law.

3 E. 3. Procl. 17.

(6) *Coram justiciariis.*] This is before the justices of the court of common pleas, and that court being particularly named, this act extended not to justices in eyre, as it is said in our books.

(7) *In casibus ubi custodiæ pertinent ad custodes.*] If one demand a ward against me, which I claime by cause of ward, he shall not have proceſſe upon this statute, lest by negligence or collusion of the gardien, the heire within age may be prejudiced, but therein the proceſſe shall be at the common law.

* [115]

C A P. VIII.

ILLI autem qui pro iterata disseisina (1) capti fuerint et detenti, non deliberentur sine speciali præcepto domini regis, et hoc per finem cum domino rege inde faciend' pro hujusmodi transgressione sua. Et si compertum fuerit (2) quod vicecomes aliter eos deliberaverit, propter hoc graviter amercietur, et nihilominus illi qui per vicecomitem sine præcepto domini regis, sic deliberantur, pro sua transgressione graviter puniantur.* Merton cap. 3. Westminster. 2. cap. 26.

THEY which be taken and imprisoned for redisseisin, shall not be delivered without special commandment of our lord the king, and shall make fine with our lord the king for their trespass. And if it be found, that the sheriff delivereth any contrary to this ordinance; he shall be grievously amerced therefore; and nevertheless, they which are so delivered by the sheriff without the king's commandment, shall be grievously punished for their trespass.

(1) H. 8. f. 1. Raft. 10. 548. V. N. B. 108. F. N. B. 188, 189. 20 H. 3. c. 3. Regist. 206.
13 E. 1. stat. 1. c. 26.)

The statute of Merton, cap. 3. as hath been said, gave the redisseisin, and post disseisin, the words of which statute being, *In persona domini regis detineantur, quousque per dominum regem, vel aliquo alio modo deliberentur.* Upon the words, *vel aliquo alio modo deliberentur*; they were delivered by the common writ *de homine replegiando*, for the liberty of a free-man is so much favoured in law, as there is ever a benigne interpretation made for the benefit thereof. Now this statute doth enact that they shall not be delivered *sine speciali præcepto domini regis*, that is, by the kings writ reciting the speciall matter, and for a fine with the king therefore to be made. And he that is attainted in a redisseisin, and in prison, this fine that this act speaketh of, as some have said, ought to be assessed in the chancery, to which end he must have a *certiorari* to remove the record thither, and out of the chancery to have his writ to discharge him: for *sine speciali præcepto domini regis*, is intendable by writ (say they) in the chancery.

And therefore if one be attainted in a redisseisin, and is at large, the party may have a *certiorari* to remove the record into the court of common pleas, and by *capias* out of that court he may be taken; and some doe hold, that this court cannot asseſſe the fine, nor make the speciall writ.

But certain it is, if a man be attainted before the sheriffe in a redisseisin, and taken in execution, because he cannot be delivered by this act without a speciall commandement of the king, he may sue a *certiorari* to remove the record before the king in his bench, in which court after he hath made fine, he is thereupon to have a writ for his delivery, reciting the speciall matter, which is the speciall commandement that this act speaketh of, which appeareth in the Register, and F. N. B.

(1) *Pro iterata disseisina.*] This doth extend as well to the post disseisin, as redisseisin.

(2) *Et si compertum fuerit, &c.*] That is, by way of indictment and conviction of the sheriffe, and so it is of the party, that procureth himselfe to bee delivered in that manner also: but no action can be grounded upon this act.

Merton, cap. 3.
Regiit. 206.
Mirror, cap. 5.
§ 3.

Bracton, lib. 3.
fo. 154.
F.N.B. 66.

Dier 36. H. 8.
60, 61.

18 H. 8. 1.

18 H. 8. ubi supra.

Regist. F.N.B.
190. f. & 247 b.

CAP. IX.

DE ſectis (1) vero faciendis ad curiam magnatum, vel ad curiam aliorum dominorum ipsarum curiarum, de cætero sic observandum est, quod nullus qui per chartam feoffatus est, distringatur de cætero ad hujusmodi ſectam faciendam ad curiam domini sui, nisi per formam feoffamenti sui specialiter teneatur ad ſectam illam faciendam (2). His autem exceptis quorum antecessores, vel ipsi, hujusmodi ſectam facere consueverunt ante primam trans-

FOR doing suits unto courts of great loras, or of meaner persons, from henceforth this order shall be observed, that none that is infeoffed by deed, from henceforth shall be distrained to do such suit to the court of his lord, without he be specially bound thereto by the form of his deed: these only except, whose ancestors, or they themselves, have used to do such suit before the first voyage of the said king Henry into Britain, sithence which

fretationem prædicti domini regis Henrici in Britanniam (3), a tempore cuius transfretationis elapsi sunt xxxix. anni et medietas unius anni ad tempus quo huiusmodi constitutiones fuerunt statutæ. Similiter nullus feoffatus a tempore conquestus sine charta vel aliquo alio antiquo feoffamento distringatur ad huiusmodi sectam faciendam; nisi ipsemet, vel antecessores sui eam facere consueverunt ante primam transfretationem prædictam (4): qui autem per chartam pro certo servitio (5), veluti pro libero servitio tot solidorum annuatim pro omni servitio solvend' feoffati sunt, ad huiusmodi sectam vel ad aliud, contra formam feoffamenti sui, de cætero non teneantur. Et si hæreditas aliqua (6), de qua tantum unica secta debeatur, ad plures hæredes participes ejusdem hæreditatis devolvatur, ille vero qui habet enitiam partem (7) hæreditatis illius, unicam faciet sectam pro se et participibus suis, et alii participes sui pro portione sua, contribuant ad sectam illam faciendam. Et si plures feoffati fuerint de hæreditate aliqua, de qua tamen unica secta debeatur, dominus illius feodi unicam sectam inde habeat (8), nec possit de prædicta hæreditate nisi unicam sectam exigere, sicut prius inde fieri consuevit. Et si feoffati warrantum, vel medium non habeant (9), qui inde eos acquietare debeat, tunc omnes illi feoffati, contribuant pro portione sua ad sectam illam pro eis faciendam. Si autem contingat, quod domini (10) curiarum tenentes suos contra hanc constitutionem, pro huiusmodi secta distringant, tunc ad querimoniam tenentium illorum attachientur eorum domini, quod ad curiam regis veniant ad brevem diem, inde responsuri, et unicum inde habeant essonium si fuerint in regno, et incontinenter deliberentur conquerenti queria sua, sive aliæ distractiones, hac occasione factæ, et deliberatæ, remaneant, donec placitum inde inter eos terminetur. Et si domini curiarum, qui huiusmodi distractiones fecerint,

which nine and thirty years and an half are passed, unto the time that these statutes were enacted. Likewise from henceforth none that is infeoffed without deed, from the time of the conquest, or any other ancient feoffment, shall be distrained to do such suits, unless that he or his ancestors used to do it before the said voyage. And they that are infeoffed by deed to do a certain service, as, for service of so many shillings by year, to be acquitted of all service, from henceforth shall not be bounden to such suits, or other like contrary unto the form of their feoffment. And if any inheritance, whereof but one suit is due, descend unto many heirs, as unto parceners, whoso hath the eldest part of the inheritance, shall do that one suit for himself and his fellows, and the other coheirs shall be contributaries, according to their portion, for doing such suit. And if many feoffees be seised of an inheritance, whereof but one suit is due, the lord of the fee shall have but that one suit; and shall not exact of the said inheritance, but that one suit, as hath been used to be done before. And if those feoffees have no warrant or mean which ought to acquit them, then all the feoffees, according to their portion, shall be contributaries for doing the suit for them. And if it chance that the lords of the fee do distrain their tenants for such suits, contrary to this act, then, at the complaint of the tenants, the lords shall be attached to appear in the king's court at a short day, to make answer thereto, and shall have but one essoin therein, if they be within the realm; and immediately the beasts, or other distresses taken by this occasion, shall be delivered to the plaintiff, and so shall remain, until the plea betwixt them be determined. And if the lords of the courts which took distresses, come not at the day that they were

*fecerint, ad diem, ad quem attachiati fuerint, non venerint, vel diem per effonium sibi datum non observaverint, tunc mandetur vicecomiti, quod eos ad alium diem venire faciat, ad quem diem si non venerint, tunc mandetur vicecomiti, quod distringat eos per omnia catalla, quæ habent in baliva sua, ita quod vicecomes respondeat domino regi de exitibus dicti hæredis, et quod habeat corpora eorum ad certum diem sibi præfigendum * coram iustitiariis. Ita quod si ad diem illum non venerint, eat pars conquerens inde sine die, et averia sua, sive aliæ districtiones hac occasione factæ, deliberata remaneant, donec ipsi domini sectam illam recuperaverint (11) per considerationem curiæ regis, et cessent interim huiusmodi districtiones, salvo dominis curiarum jure suo de sectis illis recuperandis in forma juris, cum inde loqui voluerint.*

Et cum domini curiarum inde venerint responsuri conquerentibus de huiusmodi districtionibus, et super hoc convincantur, tunc per considerationem curiæ domini regis recuperent versus ipsos conquerentes dampna sua quæ sustinuerunt occasione districtionis prædictæ. Simili autem modo si tenentes, post hanc constitutionem, subtrahunt (12) dominis [feodorum] sectas quas facere [debeant] et quas ante tempus prædictum transfretationis, et hætenus facere consueverunt, tunc per eandem iustitiam, et celeritatem quo ad diem præfigend', et districtiones adjudicand', consequantur domini curiarum iustitiam de sectis illis perquirendis, una cum dampnis suis quemadmodum tenentes dampna sua recuperarent. Et hoc scilicet de dampnis recuperandis, intelligatur de subtractionibus sibi factis, et non de subtractionibus factis prædecessoribus suis. Veruntamen domini curiarum versus tenentes suos seisinam de huiusmodi sectis recuperare non poterunt per defaultam, sicut prius fieri consuevit. De sectis autem quæ ante tempus subtractionis fuerunt, currat

lex

were attached, or do not keep the day given to them by effoin, then the sheriff shall be commanded to cause them to come at another day; at which day, if they come not, then he shall be commanded to distrain them by all their goods and chattles that they have in the shire, so that the sheriff shall answer to the king of the issues of the said inheritance; and that he have their bodies before our justices at a certain day limited. So that if they come not at that day, the party plaintiff shall go without day, and his beasts, or other distresses taken by that colour, shall remain delivered, until the same lords have recovered the same suit by award of the king's court; and in the mean time such distresses shall cease, saving to the lords of the court their right to recover those suits in form of law, when they will sue therefore.

And when the lords of the courts come in to answer the plaintiffs of such trespasses, and be convicted thereupon; then, by award of the king's court, the plaintiffs shall recover against them the damages that they have sustained by occasion of the said distress. Likewise if the tenants, after this act, withdraw from their lord such suits as they were wont to do, and which they did before the time of the said voyage, and hitherto used to do; then by like speediness of justice, as be to limiting of days, and awarding of distresses, the lords of the court shall obtain justice to recover their suits, with their damages, in like manner as the tenants should recover theirs: and this recovering of damages must be understood of withdrawing from themselves, and not of withdrawing from their ancestors. Nevertheless, the lords of the court shall not recover seisin of such suits against their tenants by default, as they were wont to do. And touching suits withdrawn before the time aforementioned,

lex communis (13), *sicut prius currere* mentioned, let the common law run as it was wont before time.

Regist. 176. F. N. B. 159. 45 E. 3. 23. (6 Rep. 1. Stat. Hiberniæ. 14 H. 3. par. 7. Partition 1. Fitz. Avowry, 15 42. 48. 51. 60. 66. 68. 89. 99. Fitz. Avowry, 86. 92.)

This chapter hath nine branches. The first is,

Regist. 176.
F. N. B. 159.
45 E. 3. 23.

(1) *De feſtis.*] This is understood of suit service to courts baron, hundreds, and the like, and not to suit reall in respect of resistance, nor to suit to the mill, for the words be, *de feſtis fac' ad curiam, &c.*

Mag. cart. c. 10.

(2) *Nullus qui per cartam feoffatus est, distringatur de cætero ad hujusmodi feſtam faciendam ad curiam domini sui nisi per formam feoffamenti sui specialiter teneatur ad feſtam illam faciendam.*] There is another clause in this chapter concerning this matter, *Qui autem per cartam pro certo servitio, veluti pro libero servitio tot solidor' annuatim pro omni servitio solvend' feoffati sunt ad hujusmodi feſtam, vel ad aliud, contra formam feoffamenti sui, de cætero non teneantur.*

3 E. 2. acc' fur
le stat. 23, 24.
4 E. 3. avow. 202.
6 E. 2. avow. 210.
3 E. 3. 27, 28.
22 E. 3. 18, b.
19 E. 3. avow.
122. 28 aff. 33.
32 E. 3. avow. 114.
14 H. 4. 5.
30 H. 6, 7.
10 H. 7. 11.
Dier 25 H. 8. 51.
F. N. B. 163. d.
† [118]
* Fleta, lib. 3.
c. 14.
F. N. B. 162, 163.

At the common law, before the making of this statute, if the lord had made a feoffment by deed, and reserved certaine services, as for example, fealtie, and 2 s. rent, or 2 s. rent generally, which had implied fealtie; in this case if the lord had distrained for homage, or suit, or any other rent or service, then was reserved in the deed, not onely the tenant and his heires, but his † assigns also, or any other tenant of the land might have rebutted the lord, his heires, or assigns, by the deed, and this doth hold betweene partie and partie, privie and privie, privie and estranger, and estranger and estranger. * But this act giveth the tenant or his heires a more speedy remedy, for hereby is given to the tenant against the lord and his heires a writ of *contra formam feoffamenti*, wherein six things are worthy of observation.

Regist.
F. N. B. 163. b.
16 H. 3. avow.
243.

1. When any act doth prohibit any wrong or vexation, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute, which in this case is a prohibition to the lord or his bailiffes, and reciteth this act, the forme whereof you may reade in the Register, and F. N. B.

Regist.
F. N. B. 163. b.

Now where it may be objected, that in Mich. 16 H. 3. reported by F. tit. *avowrie*, 243, that upon a confirmation a writ of *contra formam feoffamenti* doth lie, and by that book it should seeme, that a writ of *contra formam feoffamenti* did lie at the common law before this statute, which was made in 52 H. 3. To this it is answered, that the said case is mis-printed, for where it is Mich. 16 H. 3. it should be 56 H. 3. when the case was so resolved, and in which terme, viz. the 16 day of Novemb. Hen. 3. died, so as that opinion was after our statute: and that the writ was given by this statute, the writ (as hath been said) doth recite it. And where in this clause the statute saith (*distringatur*) all this chapter is to be understood of suit service, becaule for suit reall no distresse can be taken, but for the amerciamment in default thereof.

8 H. 4. 16.
12 H. 7. 15.

46 H. 3. avow.
243. 11 E. 3.
ibid. 100.
30 E. 3. 13.
27 E. 3. 92.

2. Where the statute saith, *contra formam feoffamenti*, yet if the lord confirme the estate of the tenant to hold by certaine services, upon this confirmation he shall have a *contra formam feoffamenti*, for that it is within one and the same reason.

3. Pra

3. *Pro certo servitio.* Upon these words if one give land in frankalmoigne, or in frank-mariage, he cannot have a writ of *contra formam feoffamenti*, because there is no certaine service contained in the feoffment or gift, and therefore out of this act, but he may rebut.

4. If the lord distreine either for suite, or for any other service, or rent not contained in the deed, the tenant shall have this writ of *contra formam feoffamenti*, for the words of this act be, *ad huiusmodi sectam, vel ad aliud, &c.*

5. The statute saith, *contra formam feoffamenti*; hereupon exposition hath been made, that this writ lyeth onely betweene privies, viz. by the tenant and his heires, against the lord and his heires, for they be included in privie of the feoffment, but so are not the assignes on either side.

* If the feoffment be without deed, the feoffee is driven to his writ of *Ne injuste vexes*.

(3) *His autem exceptis quorum antecessores vel ipsi huiusmodi sectam facere consueverunt ante primam transfretationem prædicti domini regis Henrici in Britanniam, &c.* The law doth ever favour possession as an argument of right, and doth incline rather to long possession without shewing any deed; then to an ancient deed without possession; and therefore this act doth except long possession: but in respect of the great troubles that did arise in this realm after the cancellation, which H. 3. made of the charters of *Magna Charta*, and *Charta de Foresta* in the 11 yeare of his raigne, this act doth give reliefe against any seisin since his first going over into Britaine, which was in the 14 yeare of his raigne, but the seisin before that time, when the times were regular and peaceable, this act doth except.

How, and in what manner seisins by ineroachments shall be avoided, you may reade in Bevills case, in Bucknalls case, *ubi supra*, and in the first part of the Institutes, sect.

(4) *Similiter nullus feoffatus à tempore conquestus sine carta vel aliquo alio antiquo feoffamento distringatur ad huiusmodi sectam faciendâ, nisi ipsemet seu antecessores sui eam facere consueverunt ante primam transfretationem prædictam.* Here he beginneth with feoffments without deed; in the next branch with feoffments by deed, wherein is to be observed the great antiquity of feoffments by deed or without deed of ancient time before the conquest.

Secondly, the reason in those troublesome times, since the first going over of the king (as hath been said) is not allowed of, but a seisin is required before that time, when times were regular and peaceable.

(5) *Qui autem per cartam pro certo servitio, &c.* This branch is repeated before, and coupled with the first, being both to one effect.

(6) *Et si hæreditas aliqua, &c.* For parceners, see the first part of the Institutes, sect. 241, & le Customier de Norm. cap. 30. fol. 46. tenure per parage, i. per coparcenarie, & cap. 36. fo. 55.

(7) *Ille qui habet entiam partem.* This is to be understood after partition, for before that the eldest hath not *entiam partem*, and therefore before partition this act extends not to it, and before partition there can be no contribution, as hereafter shall be said, but in the kings case all the coparceners shall doe suit as well after partition as before, and so shall their severall feoffees, for this act extendeth

4 E. 3. avow.
201. 15 E. 3.
confir. 8.
F.N.B. 163. g.
P. 10 E. 3. per
Parning.
F.N.B. 163. f.

14 H. 4. 5.
22 H. 6. 50.
30 H. 6. 7.
10 H. 7. 11.
F.N.B. 163. c.
Li. 4. fo. 121.
Bustards case.
Ibid. fo. 11.
Bevills case.
Li. 9. fo. 34.
Bucknalls case.
* Mag. Car.
c. 10.
2. Branch.

Li. 4. fo. 11.
Bevills case.
Lib. 9. fo. 34.
Bucknalls case.

[119]

3. Branch.
Fleta, li. 2. cap.
60.

4. Branch

5. Branch.

24 E. 3. 34. 73.
14 H. 3. Stat. de
Hibernia.
Vet. Mag. Char.
fo. 110.

F.N.B. 159.

extendeth not to the king, for the words be, *ad curiam magnatum, &c.*

If the eldest after partition will not doe the suit, in the case of a common person the lord may distreine the other parceners, as well as the eldest for the suit, and the other parceners may have upon this act a writ against the eldest to compell her to do the suit, and if the eldest doth the suit, and the residue refuse to contribute to her charge, she shal have upon this act a writ *De contributione facienda* to compell them to contribute.

Regist. 174.

F.N.B. 160.

F.N.B. 159.

Qui habet enitiam.] And yet this act extendeth to the feoffee of him that hath *enitiam partem*, and so it is of the tenant by the curtesie.

Note, a woman may be a free suiter to the courts of the lord, but though it be generally said, that the free suiters be judges in these courts, it is intended of men, and not of women.

6. Branch.

(8) *Et si plures feoffati fuerint de hereditate aliqua de qua unica secta debeatur, dominus unicum sectam habeat.*] This is to be understood, either when the tenant holdeth by suit, and enfeoffeth others severally, one of one part, and another of another part, &c. in certaine; there the lord shall have but one suit, and he that doth the suit shall have a writ *de contributione facienda* against the others: or where the tenant that holdeth by one suit infeoffeth many jointly, they shall make but one suit; as they shall deliver but one hawke, or other intire service; and if one of them doth the suit, he shall not have a writ *de contributione facienda* by this act, for when the possession is individed, and intire, there can be no contribution; but if one of the joynt feoffees make a seoffment in fee, the feoffee shall doe a severall suit, and the rest of the joynt feoffees shall doe but one. And if one of the severall feoffees doth the suit, if the other feoffees be distrained for the suit, they shall have a writ against the lord to discharge them of the suit, wherein it is to be noted (as before hath beene observed) what actions are grounded upon this and other the like statutes, though no mention be made of them in the acts, all which appear in the Register.

F.N.B. 159.

Regist. 174.

176, 177.

Li. 6. fo. 1.

Bruertons case.

F.N.B. 162. d.

Bruertons case
ubi sup.

Regist. 174.

176, 177.

[120]

40 E. 3. 5.

34 aff. 15.

24 E. 3. 73.

Bruertons case

ubi supra.

7. Branch.

For warranty &

acquittall, see the

1. part of the

Instit. sect. 142.

8. Branch.

If parcell of the land holden by suit come to the hands of the lord, all the suit is gone, for he neither can receive, nor make contribution.

(9) *Et si feoffati illi warrantum, vel medium non habeant.*] That is to say, if they have neither one to warrant by speciall graunt, nor any mesne by tenure which ought to acquit them, *tunc omnes illi feoffati pro portione sua contribuant, &c.* This clause is to be understood of severall tenants, as hath been said before: and no provision is made by this act concerning contribution, where the parties are provided for by graunt or tenure.

(10) *Si autem contingat quod domini, &c.*] Here is a remedy given to the tenant against the lord, if he distraine contrary to this statute.

(11) *Donec domini sectam suam recuperaverint, &c.*] Nota, the suit that is past cannot be recovered, but damages for the same.

(12) *Simili autem modo si tenentes post hanc constitutionem subtrahant, &c.*] Here is remedy given to the lord against his tenant that shall withdraw his suit.

(13) *Curat lex communis.*] See before, cap. 7.

CAP.

CAP. X.

DE tournis vice^s (1) provisum est, quod necesse non habeant (2) ibi venire archiepiscopi, episcopi, abbates, priores, comites, barones, nec aliqui viri religiosi (3), seu mulieres, nisi eorum presentia ob aliquam causam specialiter exigatur sed teneatur tournus, sicut temporibus prædecessorum domini regis teneri consuevit (4). Et qui in [diversis] hund^s habeant tenementa, non habeant necesse ad huiusmodi tournos (6) venire, nisi in balivis (7) ubi fuerint converfantes (5). Et teneantur tourni secundum formam Magnæ Chartæ, et sicut temporibus regum Richardi et Johannis teneri consueverunt. Vide Mag. Char. cap. 35.

FOR the turns of sheriffs, it is provided, that archbishops, bishops, abbots, priors, earls, barons, nor any religious men or women, shall not need to come thither, except their appearance be especially required thereat for some other cause; but the turn shall be kept as it hath been used in the times of the king's noble progenitors. And they that have hundreds of their own to be kept, shall not be bound to appear at any such turns, but in the bailiwicks, where they be dwelling. And the turns shall be kept after the form of the great charter, and as they were used in the times of king Richard and king John.

(Regist. 174, 175.)

De tournis vicecomitis provisum est quod necesse non habent ibi venire archiepiscopi, episcopi, abbates, priores, comites, barones, nec aliqui viri religiosi, seu mulieres, nisi eorum presentia ob aliquam causam specialiter exigatur.] Mirror, cap. 1. § 16. F. N. B. 160. c. Mag. Cart. c. 35. & hic ca. 18. 24.

This is the first branch of this chapter.

Before the making of this statute, the sheriffs in his tourne, and the lords of leets did use to amerce archbishops, priors, earles, barons, religious men, and women, if they came not to the tournes, or to the leets of others, because for suite reall no distresse can be taken, but for the amerciements for default of suit, which this act doth remedy; for now, seeing it is hereby provided that the persons above named shall not need to come to tournes, &c. therefore for their not coming they cannot bee amerced. 8 H. 4. 15. 12 H. 7. 15.

First, heare what the Mirror saith of this matter: *Abusien est de suffer aucun deins le realme ouster 40 jours, que il soit del age de xij. ans, insuis Anglois ou alien, sil ne soit jure al roy per serement del fealti & plevise, & en decenne; abusien est que clerks & fems sont exempt de faire al roy le dit serement, de sicome le roy prent lour homage, & lour fealty pur terre.* Mirror, cap. 5. § 1.

Now this oath is well expressed in Britton, *Voillons nous que trestous ceux de xij. ans, desoub nous facent le serement que ilz serr' foiall & loiall, & que ilz ne serr' felons ne aux felonies assentants.* Brit ca. 12 fo. 19. Lib. 7. fo. Calvins case.

And it is worthy of obervation, that by the common law, parsons of churches, that had *curam animarum*, the better to performe their function, were not compellable to come to tournes, or leets; and if they were distrained to come thither, they might have a writ, *Cum secundum consuetudinem regni nostri personæ ecclesiasticæ, rati-* Regist. 175, 176. F. N. B. 160.

tionem terrarum et tenementorum suorum ecclesiis suis annexorum ad veniend. ad visum franc' pleg' in cur. nostra, vel aliorum quorumcunque, &c. Whereby it appeareth that this writ is grounded upon the common law, being the generall custome of the realme; but other clerks (that be no parsons of churches with cure) under which name all ecclesiasticall parsons regular and secular are contained, if they be distrained to come to tourne or leet, they shall have a writ reciting this statute to be discharged thereof. Which writ beginneth, *Cum de communi consilio provisum sit quod viri religiosi non habeant necesse venire ad tournum vicecom. &c.*

So likewise women shall have the like writ, *Cum de communi consilio, &c. provisum sit quod mulieres non habeant necesse venire ad tournum, &c.*

And it is a rule of law, that whensoever a writ doth recite a statute, there the statute doth introduce a new law.

Now albeit the abovesaid persons be exempted from their personall comming to the tourne and leet, and many other persons never tooke the said oath of allegiance, yet are all subjects of what quality, profession, or sex soever, as firmly bounden to their allegiance, as if they had taken the oath, because it is written by the finger of the law in every one of their hearts, and the taking of the corporall oath, is but an outward declaration of the same.

In the chapter next before, provision was made for doing of suite service, now in this chapter a law is made concerning suite reall, by reason of resiance.

(1) *De tournis vicecom'.*] This tourne of the sheriffe is *curia vicecom' franci plegii* (as it hath been said) and therefore this act extendeth to all leets and views of frankpledge, of all other lords and persons.

(2) *Necesse non habeant.*] That is, they are not compellable to come, but left to their owne liberty, *nisi eorum presentia ob aliquam causam specialiter exigatur*, as to be a witnesse or the like.

(3) *Nec aliqui viri religiosi.*] *Religiosi* in the proper sense are taken for those that be regulars; but ecclesiasticall persons, that be seculars are also within this act, and that doth notably appeare by a writ in the Register, *Cum personæ ecclesiasticæ non habeant necesse venire ad tournum vicecom. vel ad visum franci plegii, &c. juxta formam provisionis de communi consilio regni nostri in consimili casu pro viris religiosi factæ, &c.* Whereby it appeareth, that ecclesiasticall persons secular, are in *consimili casu* with them that be *religiosi*, and consequently within this act.

(4) *Sed teneatur tournus sicut in temporibus prædecessorum domini regis teneri consueverunt, et teneantur tourni secundum formam Magnæ Chartæ et sicut temporibus regis Richardi et Johannis teneri consueverunt.*] In this 52 yeare of H. 3. so long it was by effluxion of time since the raigne of H. 2. mentioned in *Magna Charta*, that this act had just cause to have reference to the times of R. 1. and king John.

(5) *Et qui in diversis hundredis habeant tenementa, non habeant necesse ad hujusmodi tournos venire nisi in baliwis ubi fuerint conversantes.*] Here *hundredum* is taken *pro visu franci plegii*: so as the sense is, that he which hath tenements in the tourn, and in some other view of frankpledge of some other lord, or in divers views of frankpledge, he shall not need to come to any other but where he

Regist. ubi supra.

Regist. ubi supra.

F.N.B. 161.

3 H. 5. tit. ult. gar. Statham.

Mag. Chart. c. 35. F.N.B. 159, 160, 161. Regist 175, 176.

See the first part of the Institutes, sect. 133.

In consimili casu.

[122]

Mag. Chart. c. 35.

F.N.B. 160.

Mag. Chart. c. 35.

he is conversant, and hundreds here are named, because sheriffes (as hath been said) kept their tournes in every hundred.

(6) *Ad hujusmodi tournos.*] Here *turnus* is taken not only for the kings view of frankpledge, but for the views of frankpledge of other lords.

(7) *In balivis.*] Here *baliva* is taken for the tourn or leet where he is conversant.

If a man hath a house within two leets, he shall be taken to be conversant where his bed is, for in that part of the house he is most conversant, and here conversant shall be taken for most conversant.

If a man hath a house and family in two hundreds, so as he is in law conversant or commorant in both hundreds, yet he shall doe his suit to the tourne or leete where his person is commorant.

Lastly, if any man be grieved in any thing contrary to the purview of this statute, he shall have an action grounded upon this statute (as often in other cases hath been observed) for his remedy, and relief therein, which actions appear in the Register.

33 H. 6. fol. 9.
19 H. 6. fol. 1. a.

Mag. Chart. c. 35.
& hic, cap. 9.
Registr. 174, 175.
F. N. B. 160,
161. d.
36 E. 3. cap.

CAP. XI.

PROVISUM est etiam, quod nec in itinere justic', nec in comitat', in hundred', nec in curia baron' de cætero capientur fines ab aliquibus pro pulchre placitand' (1), neque [pro eo] quod non occasionentur (2). Et sciendum est, quod per istam constitutionem non tolluntur fines certi (3), seu præstationes arrentatæ à tempore quo dominus rex primum transfretavit in Britanniam usque nunc.

IT is provided also, that from henceforth neither in the circuit of justices, nor in counties, hundreds, and court barons, any fines shall be taken of any man for fair-pleading, nor so that any occasion shall be. And it is to be known, that by this act fines certain, or loans assessed since the time that our lord the king first passed into Britain, are not taken away.

W. 1. ca. 8. 1 E. 3. cap. 8. stat. 2. Britton, fol. 32. Fleta, li. 2. ca. 60. (1 Ed. 3. stat. 2. c. 8. 3 Ed. 1. c. 6. Registr. 179.)

Before the making of this statute, justices in eyre, the suitors in the courts of the county, hundred, and court baron did use to set fines at their pleasure upon the defendant or plaintife, tenant or demandant, and not upon the counsell learned for vicious pleading; and the reason thereof was, for that it was in delay of justice, and so a contempt to the court, and then he had leave to amend it, and to make it perfect, which is called *Beaupleder*. This act consisteth upon two branches: by the first all fines incertain for vicious pleading, and for amendment thereof, are wholly taken away.

By the second, fines certain for vicious pleading, and amendment thereof assessed since the first going of H. 3. into Britain, which was in the 14 yeare of his raigne, are not taken away by this statute.

(1) *Pro pulchre placitando.*] In truth it was, as hath been said,

as

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as well in respect of the vicious pleading, as of the faire pleading by way of amendment.

This extended to pleadings, and not unto counts, and pleints, neither doth it extend to the kings higher courts of justice, but to these foure here named, for in the higher courts there were faire and good pleadings; whereof the English poet (speaking of the serjant at law) saith,

Chaucer.

Thereto he could indite and make a thing,
There was no wight could pinch at his writing,

(2) *Neque pro eo quod non occasionentur.*] That is; that for that cause they should not be occasioned or troubled.

Regist. 179.
F.N.B. 270.
13 E. 1. Attach-
ment 8.

If any man be grieved contrary to the purview of this statute, he may have an action in nature of a prohibition upon this statute.

(3) *Non tolluntur fines certi.*] And the reason of this was, for that fines certaine grew by consent, and therefore this act tooke them not away, for *omnis consensus tollit errorem*; and I have seene; and doe know in divers court barons, &c. fines certain for *beaupleder* paid to this day.

* [124]

C A P. XII.

IN *placito vero dotis, quod dicitur unde nihil habet* (1), *dentur de cætero quatuor dies per annum ad minus, et plures si commodè fieri poterit, ita quod habeant quinque vel sex dies ad minus per annum.* In *affisis* [autem] *ultimæ præsentationis, et in placito quare impedit* (2) *de ecclesiis vacantibus, dentur dies de quinden' in quinden' (3), vel de tribus septimanis in tres septimanas, prout locus fuerit propinquus, vel remotus.* Et in *placito quare impedit, si ad primum diem ad quem summonitus fuerit* (5), *non venerit* (4), *nec essonium miserit impeditor, tunc attachietur ad alium diem, quo die si non venerit, nec essonium miserit* (6), *distringatur per magnam districtionem superius datam.* Et si tunc non venerit per ejus default scribatur episcopo illius loci quod reclamatio impeditoris illa vice conquerenti (8) *non obstat* (7), *salvo impeditori alias jure suo, cum inde loqui voluerit.* Eadem lex * *de attachiamentis* (9) *faciendis in omnibus brevibus ubi attachiamenta jacent de cætero (quoad districtiones faciendas) firmiter observetur:*

IN a plea of dower, that is called *unde nihil habet*, from henceforth four days shall be given in the year at the least; and more if conveniently it may be, so that they shall have five or six days at the least in the year. In *affises of darraine presentment*, and in a plea of *quare impedit*, of churches vacant, days shall be given from fifteen to fifteen, or from three weeks to three weeks, as the place shall hap to be near, or far. And in a plea of *quare impedit*, if the disturber come not at the first day that he is summoned, nor cast no essoin, then he shall be attached at another day; at which day if he come not, nor cast no essoin, he shall be distrained by the great distress above given; and if he come not then, by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the plaintiff; saving to the disturber of his right at another time, when he will sue therefore. The same law, as to the making of attachments, shall from henceforth be observed.

*observetur: ita tamen quod secundum
attachiamentum fiat per meliores ple-
gios, et postmodum ultima districtio.*
[Vide artic^{us} super chartas cap. 15.]

observed in all writs where attach-
ments lie, as in making distresses, so
that the second attachment shall be
made by better pledges, and after-
wards the last distress.

Vide 51 H. 3. Dies Communes in Banco, in placito dotis. (32 H. 8. c. 21. Fitz. Jour. 18, 19.
32. 11 H. 6. 4. 33 H. 6. 1. Fitz. Brief, al. Eveque, 14. 21, 22. 27. 32 H. 8. c. 21.)

The mischief before this act was, that in a writ of dower,
unde nihil habet, there were dayes of common return, as in other
reall actions, which was mischievous to the woman, in respect
of the long delay, she claiming but an estate for her life, which
mischief this statute, as by the letter thereof appeareth, doth
remedy.

And this statute in favour of dower is also extended against the
vouchee, for this act saith, in *placito dotis*, and the vouchee is in
placito dotis.

(1) *Unde nihil habet.*] This act extends not to a writ of right 32 H. 8. cap. 21.
of dower, but the statute of 32 H. 8. extends to it, neither doth
this act extend to a writ of dower *ad osium ecclesiæ*, or *ex assensu pa-*
tris, unless it be *unde nihil habet*, but the said act of 32 H. 8. ex-
tends to every writ of dower.

(2) *In assis ultimæ presentat' et in placito quare impedit.*] This 26 E. 3. 75.
act extendeth not to a writ of *quare non admittit*, nor to an *incum-*
bravit, but onely to the assise of *darrein presentment*, and *quare im-*
pedit, and the reason thereof is, for feare of the laps. 17 E. 3. 21.
18 E. 3. jour 19.

(3) *Dentur dies de quindena in quindena.*] By assent of parties 11 H. 6. 23.
a longer day may be given then is prescribed by this act, but that
assent must be entred of record.

And it is to be observed, that by the common law great delays
bee disallowed in foure kinds of actions, viz. in all writs of dower,
quare impedit, assise of *darrein presentment*, and assise of *novel dis-*
seisin, and therefore no protection shall be allowed, or *essoine de*
servitio regis shall be cast in any of them. 44 E. 3. 5.
39 H. 6. 40.
Artic. super
Chartas, cap. 15.

(4) *In placito quare impedit si ad primum diem ad quem summo-*
nitus fuerit non venerit, &c.] At the common law in a *quare im-*
pedit, the proces was summons, attachment, and distress infinite,
which was mischievous in respect of the laps, now it is provided
that if he appeare not at the ground distress, judgement shall be
given for the plaintife, and a writ to the bishop awarded. Brañ. l. 4. fo.
246, 247.
Fleta, lib. 5. c. 16.
Brit. 233.
11 H. 6. 4.

(5) *Summonitus fuerit.*] Put the case that upon the summons,
the defendant is returned *nihil*, and at the attachment and dis-
tress, *nihil* also; this case is out of the letter of the statute, for the
defendant was never summoned, but it is said, * that when there
be two mischiefs at the common law, and the lesser is provided
for by expresse words, the greater shall be included within the
same remedy; this case when *nihil* is returned is the greater
mischief, for he by his default shall lose nothing, but in the case
provided, the defendant by his default shall lose issues, and the law
intends that he will rather appeare then lose issues. 14 E. 3.
Default 17.
11 H. 6. 4. 5.
21 H. 6. 56.
Lib. 5. fol. 41.
* *Regula.*

A *quare impedit* is brought against two, upon the distress one 7 E. 3. 4
doth appeare, and the other makes default; in 7 E. 3. it was re-
solved that the plaintife should not presently have a writ to the
bishop against him that makes default, for that it might be, that
the

the other that appeares shall have against the plaintife a writ to the bishop; and it was there said, that it was not reasonable, that upon one originall the plaintife should have one writ to the bishop for him, and another against him; but this notwithstanding the plaintife by this act ought to have against him that makes default a writ to the bishop; and it is not against reason, if the other defendant can barre the plaintife, for him to have a writ to the bishop against the plaintife by the common law, and so bee the later bookes, and common experience at this day.

(6) *Tunc attachietur ad alium diem, quo die si non venerit nec essonium miserit.*] *Essonium*, or *exonium* is derived of the French verb *essonier*, or *exonier*, which signifieth to excuse, so as an *essoine* in legall understanding is an excuse of a default by reason of some impediment, or disturbance, and is as well for the plaintife as the defendant, and is all one with that which the civilians call *excusatio*. * Of *essoines*, there have been (as we reade in our bookes) five kindes, *viz.* 1. *De servitio regis.* 2. *In terram sanctam.* 3. *Ultra mare.* 4. *De malo lecti*, in our old bookes called *essonium de resantifica.* 5. *Et de malo veniendi*, and this last is the common *essoine*, which is intended in this act.

In a *quare impedit*, or *darrein presentment*, an *essoine de service le roy*, *ad terram sanctam*, or *ultra mare* lyeth not for doubt of the laps, but a common *essoine* lieth, and of *essoines* the Mirror said well, *Abusio est que faux causes de essoines sont receivables de cy que droit ne allowe fauixime in nul case*, & *abusio est dallower essoine in personel action*; for the same author treating *De articles per viels roys ordein*, saith, *Ordein fueront essoines in mixt actions, & realls, & ne in personels*; and I finde, not in Glanvill any *essoines*, but in reall and mixt actions, but before the making of this act, *essoines* were allowed in personall actions.

Non jacet essonium, quia summonitio testificata non est, vel par non attachiatur, eo quod vicecomes mandavit quod non est inventus.

(7) *Per ejus defaultam scribatur episcopo quod reclamatio impeditoris illa vice conquerenti non obsistat.*] Upon these words of this act the plaintife shall have a writ to the bishop without making of any title.

The statute saith only, *Scribatur episcopo*, and yet the plaintife shall have both a writ to the bishop, and besides a writ to enquire of damages; if the bishop be out of the realme, a writ to the bishop may be awarded to his vicar generall, for he is in place of the bishop.

If the defendant appeare at the grand distresse, and take a day by *prece partium*, and after make default, no writ shall be awarded to the bishop, for this case in respect of his appearance is out of the statute, but a new distresse shall be awarded.

(8) *Conquerenti.*] The king shall take the benefit of this statute.

(9) *Eadem lex de attachiamentis, &c.*] This is the last clause of this chapter, and is to be understood according to the letter, and needeth not any exposition.

C A P. XIII.

ET sciendum est [quod] postquam aliquis posuerit se in inquisitionem aliquam (1), quæ emerferit, vel emergere poterit in hujusmodi brevibus, non habebit nisi unicum, effonium (2), vel unicam defaultam (3), ita quod si ad diem sibi datum per effonium suum non venerit, aut secundo die defaultam fecerit, tunc inquisitio illa per ejus defaultam capiantur, secundum inquisitionem illam ad judicium procedatur. Si vero inquisitio illa capta fuerit in comitatu (4) coram vicecomite vel coronatore, ad justiciarios domini regis ad certum diem est remittenda. Et si pars rea non venerit ad diem illum, tunc propter defaultam ipsius assignetur et alius dies, secundum discretionem justiciariorum, et mandetur vicecomiti, quod ad diem illum faciat eum venire ad audiendum judicium (si velit) secundum inquisitionem illam. Ad quem diem si non venerit, propter defaultam suam procedatur ad judicium. Eodem modo fiat, si non veniat ad diem sibi datum per effonium suum.

AND it is to be known, after that a man hath put himself upon any enquest, the which hath or must pass in such manner of writs, he shall have but one effoin, or one default; so that if he come not at the day given to him by the effoin, or make default the second day, then the enquest shall be taken by his default, and according to the same enquest they shall proceed to judgement. And if such enquest be taken in the county, before the sheriff or coroners, it shall be returned unto the king's justices at a certain day; and if the party defendant come not at that day, then, upon his default, another day shall be assigned to him after the discretion of the justices; and it shall be commanded to the sheriff, that he cause him to come to hear the judgement, if he will, according to the enquest; at which day, if he come not, upon his default they shall proceed to judgement. In like manner it shall be done, if he come not at the day given unto him by his effoin.

Dier, 5 Eliz. 224. 15 Eliz. 324. (Fitz. Effoin, 21. 33. 34. 38. 100. 130. 159. Godbolt 236. pl. 327. Salk. 216.)

The mischief before this statute was for the great delay that 2R.2, Effo. 159. might come to the plaintife in any personall action.

(1) *In inquisitionem aliquam.*] That is, when issue is joyned, and the defendant *ponit se super patriam, et prædict' querens similiter.*

This statute extendeth not to a demurrer in law.

In an action of debt *un custome de London fuit alledge & denie per 21 E. 4. 74. 78. le pl'*: this issue shall not be tryed by inquest, but by the certificate of the maior by the mouth of the recorder, *proces issuiß al maior a certifier a quel jour le def. pria desfre effoine*, and was effoined by the opinion of the whole court, for this tryall was not *per patriam*.

(2) *Nisi unicum effonium.* Here *effonium* is taken for a common effoine, and extendeth not the effoine *de servitio regis, &c.*

This is to be understood where an effoine doth lie, for this act restraineth delaies, and giveth not any, where none was before. And therefore after issue in a *scire fac'*, the defendant shall not be effoined, because no effoine lyeth in that case, *et sic de similitus.*

L 2

But

2 E. 4. 19.

But if there be divers tenants in a *præcipe*, or divers defendants in a personall action, albeit in law they be but one tenant, or one defendant, yet each of them shall have one essoine; and so hath this act been expounded.

20 E. 3. Esso. 30.

22 E. 3. 4. 7.

2 R. 2. essoine

159.

14 H. 6. 1.

Dier, 5 Eliz. 224.

15 Eliz. 324.

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(3) *Vel unicam defaultam, &c.*] Upon consideration of these words, and of these words subsequent, *tunc inquisitio illa per defaultam capiatur*, two conclusions are collected. 1. That this act extendeth to the defendant, and not to the plaintife, because the defendant maketh default, and on the plaintifes side it is called a non-suit: also the enquest is awarded by the default of the defendant. And lastly, the mischief was for the delay of the plaintife by the defendant, and therefore the delay which the plaintife maketh himselfe is out of the mischief, and remains at the common law.

14 H. 6. 19.

9 H. 5. 12. 13.

Dier, ubi sup.

The second conclusion is, that this act is to be understood in an action personall, for that no enquest in any action reall can be taken by default.

(4) *Si verò inquisitio capta fuerit in comitatu, &c.*] The meaning of this clause is, that if after issue joyned in a base court, the defendant hath had his essoine, yet if the plea be removed before the kings justices, he shall have another essoine before the justices, for the proceeding in the base court is not of record above.

C A P. XIV.

DE chartis vero exemptionis, et libertatis (1), ne ponantur impetrantes in assisis, juratis, vel recognitionibus aliquibus: provisum est, quod si adeo necessarium sit eorum juramentum, quod sine eis justitia exhiberi non poterit (veluti in magnis assisis, et in perambulationibus, et in chartis vel scriptis conventionum, uti fuerunt testes nominati (2), aut in attinētis, vel aliis consimilibus) jurar' cogantur, salva sibi aliàs libertate, et exemptione sua prædicta (3).

CONCERNING charters of exemption and liberties, that the purchaser shall not be impannelled in assises, juries, and enquests; it is provided, that if their oaths be so requisite, that without them justice cannot be ministred, as in great assises, perambulations, and in deeds or writings of covenants, (where they be named for witnesses) or in attaints, and in other cases like, they shall be compelled to swear; saving to them at another time their foresaid liberty and exemption.

W. 2. cap. 28. 29 H. 6. c. 3. (34 H. 6. 25. 18 H. 8. 5.)

34 H. 6. 25. per Moyle.

21 E. 4. 47. b.

(1) *De chartis vero exemptionis et libertatis, &c.*] Hereby it appeareth that this act is in affirmance of the common law, for every charter of any franchise or liberty whatsoever, by reason whereof there should be a failer of justice, is void and of none effect in law, as in the case of conusans, and this case of exemption.

39 E. 3. 15.

12 E. 4. 17.

35 H. 6. 42.

Broke exempt 6.

In this act there be foure examples set downe, *viz.* the grand assise in the writ of right, in the writ of *rationabilibus divisis*, here called in *perambulationibus*, in deeds where witnesses be named, and in attaints.

Rationabilibus

Rationabilibus divisis.]

Magna assisa inter Priorem de Tynemurwe petentem, & Simonem de Rucestre tenentem, de eo quod idem Simon permittet rationabiles divisas fieri inter terras ipsius Prioris in Weiham, & terras ipsius Simonis in Rucestre, sicut esse debet & solet. Et unde idem Simon qui tenens est posuit se magnam assisam illam, & petit recogn' fieri, utrum ipse majus jus habet in quindecim acris terræ, & quindecim acris moræ, cum pertin' in Rucestre * per metas & divisas subscriptas, scil. incipiendo apud altam viam quæ extendit se ultra Swalnespotleche, & sic descendendo per Swalnespotleche versus austrum usq. Rysdenburne, ubi Swalnespotleche & Rysdenburne conjungunt, & sic ascendendo in Rysdenburne versus boream usque le Alderwylumway, & sic adhuc per Rysdenburne versus boream usque le Redeford, ubi alta via transit versus novum Castrum super Tynam sicut illas tenet, An prædictus Prior per metas & divisas subscriptas, viz. incipiendo apud Redeford, & sic per altam viam versus occidentem usq. * Munlesbened, & sic versus occidentem per altam viam usq. Swalnespotleche, & sic de Swalnespotleche versus austrum usque Rysdenburne, & sic de Rysdenburne versus boream ascendendo usq. Redeford prædict' sicut illas exigit: ven' recogn' in forma prædict' per Willielmum de Haulton, Robertum de Insula, Nicholaum de Punchardon, Iohannem de Oggeill, Iohannem de Eslington, Richardum de Horfele, Hugonem Gobion, Walterum de Eglytheneham, David de Coupland, Franconem Tyeys, Henricum de Dytheend, & Robertum du Maner, & modo veniunt prædict' Simon & Prior per attorn' suos: Et prædicti milites super sacramentum suum dicunt, quod prædictus Simon majus jus habet in prædictis teneamentis per prædictas divisas per quas illa tenet, quam prædictus Prior per divisas per quas illa exigit. Ideo consideratum est, quod prædictus Simon eat inde sine die, & teneat prædictum teneamentum sibi & heredibus suis per prædictas divisas, scil. incipiendo apud Swalnespotleche ubi alta via extendit se ultra Swalnespotleche, & sic descendendo per Swalnespotleche versus austrum usq. Rysdenburne ubi Swalnespotleche & Rysdenburne conjungunt, & sic ascendendo per Rysdenburne versus boream usq. Alderwylumway, & sic adhuc per Rysdenburne versus boream usque le Redeford ubi alta via transit versus novum Castrum super Tynam, quiete de prædicto Priore & successoribus suis, et ecclesia sua de Tynemurwe imperpetuum, & Prior in misericordia, &c.

Magna assisa inter Priorem de Tynemurwe petentem, & Richardum Turpin tenentem de eo, quod idem Richardus permittet rationabiles divisas fieri inter terras ipsius Prioris in Wylum, & terras ipsius Richardi in Hoghton, sicut esse debent & solent, et unde idem Richardus, qui tenens est posuit se in magnâ assisam illam, et petit recogn' fieri, utrum ipse majus jus habet in medietate decem acrarum moræ, viginti acrarum terræ, et sexaginta acrarum bosci, cum pertin' in Hoghton, per metas et divisas subscriptas, videl. incipiendo ex parte boreali de le Thwertonerdike, et sic versus boream usq. ad cursum aquæ quæ currit inter le Strother de Hoghton, et le Strother de Rucestre, et sic sicut cursus illius aquæ se extendit versus occidentem usque Redeford, et sic descendendo versus austrum usq. le Holleford, et sic del Holleford descendendo versus austrum usq. Rysdenburne, usque ad terram arabilem de Wylum, et sic per fossatum ejusdem terræ usque lel Longbing quod venit de bosco de Wylum, et sic descendendo versus austrum sicut Sygpthway se extendit inter boscum de Hoghton, et boscum de Wylum, et usq. Wylum Halugh, et sic per fossatum quod se extendit versus orientem inter Wylum Halugh et boscum de Hoghton usq. Alberystrother in parte occidentali, et sic per partem occidentalem de Alberystrother versus austrum usque les Pullys per partem

Pasch. 18 E. 1. rot. 65. in Banc. Northumb. de rationabilibus divisis.

Magna Assisa utrum ipse majus jus, &c.
* Per metas & divisas.

Vide Mich. 3 E. 1 in Banc. rot. 26. Sur'Int' Priorem de Berm. & Priorem de Hida-wint. Pasch. 6 E. 1. in Banc. rot. 57. Salop. Int. Episc. Hereford & Petr. Corbet perambulation. Vide Pasch. 8 E. 1. in banc. rot. 53.

Veredictum.

Judicium.

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Finale.

Pasch. 18 E. 1. in Banco. rot. 72. Northumb. Mich. 18 E. 1. in Banc. rot. 76. Northumb.

partem occidentalem, et sic de les Pullys versus occidentem per quoddam fossatum usq. quoddam Run quod se extendit usque aquam de Tyne salva communia pasturæ eidem Priori et successoribus suis in prædicta mora de Hoghton usque le Thwertonerdike per partem occidentalem, et sic per partem occidentalem de le Br-hill, et de Hyndeschawe, et sic versus austrum descendendo per le Grenceleghe, et sic usque Syggethway sicut ea tenet, an prædictus Prior per metas et divisas subscriptas, videlicet incipiendo in parte boreali in Wylummore descendendo versus austrum per le Thwertonerdike usque Thornrawe, et sic de Thornrawe usque Martinpol versus austrum, et sic de Martinpol usque Aldeherwey et sic descendendo per le Haldeheyway versus austrum ultra Ravenesburne, et sic de Ravenesburne versus austrum et iterum ultra Ravenesburne, et sic de Ravenesburne versus austrum usq. Standandestian, et sic de Standandestian versus austrum usq. le Fisherewey usq. aquam de Tyne sicut illum exigit. Venit recogn. in forma prædicta ter Willielmum de Hauleton Robertum de Insula, Nichol. de Punchardon, Iohannem de Oggill, Iohannem de Eslington, Robertum de Glantingdon, Richardum de Horslee, Hugonem Gohyon, Walterum de Egleytham, David de Coupeland, Francione Tyeis, & Henric. de Dycbeend. Et modo veniunt prædicti Richardus, & Prior per attornatos suos, & prædicti milites super sacrum suum dicunt quod prædictus Richardus majus jus habeat tenendi medietat. prædictorum ten. per easdem metas & divisas, per quas idem Richardus superius clam., quam prædictus Prior. Ideo considerat. est quod prædictus Richardus eat inde sine die, & teneat medietat. prædictorum ten. cum pertinent. per prædictas metas & divisas, per quas illam clam. sibi & hæred. suis quiete de prædicto Priore & successoribus suis, & ecclesia sua de Tyne-muwe imperpetuum. Et Prior in misericordia.

Verdictum.

Judicium finale

Vide Mich. 18 E. 1. in Banco Rot. 76. Northumb. a notable record. For this writ de rationabilibus divisis, and the writ de perambulatione fac., vide Regist. 157. b. Glanvill, lib. 9. cap. 14. Bracton, lib. 4. fol. 207. a. 211. b. De perambulatione fac. lib. 5. 372. a. & 444. De rationabilibus divisis. Fleta, lib. 4. cap. 15. lib. 5. cap. 9. 39. 31 E. 1. Droit, 70. 5 E. 3. fol. 12. 28 E. 3. fo. 43. 14 E. 3. tit. Aid 23. 29 E. 3. 45. 45 E. 3. 4. 3 E. 4. 10. F. N. B. 128. m. & c. 133. d. & c. Vet. 73. 74. Coke, lib. intr. 565, 566. lib. intrat. Rast. 541. 495.

Upon all these records and books, the learning of these two writs standeth thus:

1. This writ of *rationabilibus divisis* is a writ of right in his nature, wherein bataille, and the graund assise lieth, and judgement finall shall be given: in this writ the view and voucher is to be graunted, and esples are to be laid, and this writ *est breve ad-verfarium*.

2. The writ de *perambulatione facienda*, is no writ of right in his nature, and is *breve amicabile*, and had by consent of parties.

3. The perambulation may be made as well by commission to certain persons as by writ; but the proceeding, de *rationabilibus divisis*, is by writ only.

4. This is common to them both for a division to be made between severall townes or hamlets.

5. If it be for a division between two counties, for the better directions of sheriffes, coroners, and other the kings officers, and ministers, it must be done by the kings commission under the great seale, but the division hereby made shall not stoppe or conclude the parties interested in the land.

Upon

Upon the verdict in any of the four examples before mentioned, no writ of attaint doth lie; then followeth these words, *Et in aliis casibus consimilibus*: these by the letter of this statute, must be such, as thereupon no attaint doth lie; as in the *partitione fac'*, and other inquests of office, as hath been said: but all charters tending to the failer of justice, are void by the common law, without any aide of this act: as if there be not sufficient hundreders, besides those that have charters of exemption, for triall of an issue in an action, wherein an attaint doth lie, there charters shall be disallowed, because *sine eis justitia exhiberi non potest*, and so in all other like cases: so if the king graunt an exemption to all the freeholders in one county, and to all the citizens in a city, this is void.

(2) *In chartis, &c. ubi testes fuerint nominati.*] Hereby it appeareth, that by the common law, the witnesses named in the deed should joyne with the enquest, or else the charter of exemption, *De assis juratis et recognitionibus aliquibus*, should not have freed them. Vide the first part of the Institutes, and see before cap. 6.

[130]
1 Part of the Institutes, sect. 1.

In attinctis.] Hereby appeareth that the writ of attaint, which by our old books and auncient records is called *brevs de convictione*, was given by the common law, and the forme of the writ is set downe in our auncient authors at the suite of the party grieved: and it appeareth by the Register that no writ of attaint reciteth any statute, and the judgement in the writ of attaint is fearfull and penall, and given by no statute, and this is proved by this act, which nameth attaints, and is before any act of parliament in print made concerning attaints.

And it seemeth by our old bookes and auncient records, that by the common law, it lay as well in plea reall as personall. Vide Regist. 122. Mirror, cap. 3. De Attaints. & cap. 2. § 4. De Loiers. Glanville, lib. 2. cap. 19. Bracton, lib. 4. fol. 289. Fleta, lib. 5. cap. 21. 34. Britton, cap. 97. fol. 237. 6 H. 3. tit. Attaint, 72, & 73. 15 H. 3. ib. 74. Temps E. 1. ibid. 70. 12 E. 1. ib. 71. 30 Aff. 24. 28 E. 3. 91. 44 E. 3. 2. b. Temps R. 2. Conusans, 88. 3 H. 4. 15. Fortescue, ca. 26. F. N. B. 107. k. W. 1. cap. 38. 47. 1 E. 3. cap. 6. 5 E. 3. cap. 6, 7. 28 E. 3. cap. 8. 34 E. 3. cap. 7. 23 H. 8. cap. 3. See the first part of the Institutes. Sect. 514. Verb. en Attaint.

But some say the writ could not be obtained without difficulty (because he had other remedy to try it in an action of higher nature) and therefore the statutes were made. See the statute of W 1. cap. 38. and the exposition thereupon, and a judgement given. Mich. 5 E. 1. Of an attaint heare what the Mirror saith, *En temps le roy Henry le primer estoit ordein & communement assentu que jurors in enquests, &c. in attaints, et tiels autres ne prendront rien de loiers, &c.* See the other ancient authors and books above cited; by them it appeareth how necessary the reading of auncient authors and records be for the knowledge of the common law, and how the statutes concerning attaints are but in affirmance of the common law, for the plaintife may have upon them the penall and severe judgement given by the common law. Vide 40. Aff. 23.

See W. 1. cap. 38.

40 Aff. 23.

F. N. B. 165, 166
Act D.

39 E. 3. 15.

40 E. 3. 30.

18 H. 8. 5.

If a man have a charter of exemption, and sheweth it to the sheriffe, yet notwithstanding he may retourne him, for the sheriffe is not to judge of his charter, nor to allow, or disallow thereof; but if he will have the effect of his charter, he must sue out a writ of allowance of his charter, and deliver the writ to the sheriffe, and

L 4

shew

shew his charter to him, and then if the sheriffe retourne him, he may have his action upon his case against the sheriffe, and so must our old and other books be intended.

18 H. 8. 5.

After the sheriffe hath retourned him, if a full jury doe appeare, then he may shew forth his charter, and if the plaintiffe confesse it, he shall be discharged, but if the plaintiffe saith that he is not the same person, it shall be presently tried, and so in the like case; but he cannot plead his charter for his discharge before a full jury doe appeare, for if any answer bee made thereunto the jury must try it.

41 E. 3. exemption 4.

42 Aff. 25.

25 H. 6. exemption 5.

Such generall charters of exemption in *assisis, juratis, et recognitionibus*, as in this act are mentioned, shall not be allowed where the king is either sole party, or where the suite is *tam pro domino rege quam pro seipso*, without these or the like words, *licet tangat nos*.

18 E. 3. 20.

3 H. 6. 14.

36 H. 6. 32.

Salva semper alias libertate et exemptione prædicta.] And so it is in case of conufance, and of a protection, the party may waive the benefit of it in one action, and yet take the advantage of it in another: and so if a *non omittas* be awarded within a franchise that hath retourn of writs, yet he shall in other suits enjoy it.

[131]

C A P. XV.

NULLI de cætero liceat (1) ex quacunque causa districtiones facere (3) extra feodum suum, nec in via regia, aut in communi strata (2) nisi domino regi et ministris suis (4) specialem auctoritatem ad hoc habentibus.

IT shall be lawful for no man from henceforth, for any manner of cause, to take distresses out of his fee, nor in the king's high-way, nor in the common street, but only to the king or his officers having special authority to do the same.

Fleta, lib. 2. ca. 41. W. 1. c. 16. Artic. Cleri, cap. 9. Artic. super Cart. ca. 12. 51 H. 3. Dist. de Scaccar. (8 Rep. 60. 7 H. 7. 1. 22 Ed. 4. 40. Fitz. Bar. 281. Fitz. Trespass, 188. Fitz. Brief, 511, 842. Fitz. Avowry, 87, 232. Raft. 226. Regist. 98. 183. 9 Ed. 2. stat. 1. c. 9. 2 Inst. 131. Cro. El. 710.

13 E. 4. 6.

The mischief before this statute was, that whereas the king by his prerogative might distrein for his rent in any other lands of his tenant, being in his owne actuall possession, though they were out of his fee, and seigniory, divers lords tooke upon them also to distrein out of their fee, which was wrong and oppression: and whereas all the kings subjects ought to have free passage in *via regia, et communi strata*, as well to faires and markets, as about their other affairs, the lords used to distrein in the high-ways, both which mischiefs this statute doth remedy.

(1) *Non liceat.*] This is divided into three branches: the first branch is, *Non liceat ex quacunque causa districtiones facere extra feodum.*

34 E. 1.

Avowry 232.

41 E. 3. 26.

2 H. 4. 24.

1. This is to be understood of distresses, by reason of a seigniory, and not for distresses for rent charges, &c. or by reason of a leet.

2. This

2. This branch is but in affirmance of the common law, for regularly no subject can distrein out of his fee and seignory, and therefore if the lord doe distrein out of his fee, the tenant may either have an action of trespassse at the common law, or an action upon this statute, but in some speciall case the lord by the common law may distrein out of his fee and seignory, as if the lord come to distrein, and the tenant, or any other seeing the lord come to distrein them, drive them to a place out of the fee of the lord, yet in this case the lord may distrein them out of his fee, because the lord had a view of them within his owne fee, by reason whereof the lord shall be adjudged in a kinde of possession of them; but if the beasts goe out of the tenancy of themselves without enchafement before the lord can distrein them, there the lord cannot distrein them, though he had the view of them within his fee, and seignory.

The second branch is,

(2) *Nec in via regia, aut in communi strata.*] See what shall be said, *regia via*, and what *communis strata*, in the first part of the Institutes, sect. 69.

This law had the foundation of the auncient law of England before the conquest, *Alia, s. immunitas, quam habent quatuor chemini (i. viæ regie) Watlingstreet, Fosse, Hilkenildstreet, et Erminstreet, quorum duo in longitudinem, alii duo in latitudinem descendunt.*

In this branch, *non liceat* shall be taken not *simpliciter*, to make it utterly unlawfull, as to take advantage thereof in barre to an avowry, but *secundum quid*, that is to this purpose, that if the lord distrein in the high street, or in the common way, the tenant may have an action against the lord upon this statute: and the reason hereof is, that whensoever any thing is prohibited by a statute, the party grieved shall have his action upon the statute, and the offender shall be for his contempt fined and imprisoned; and so it is declared by act of parliament, as hath been often observed. Now if the tenant should plead it in barre of the avowry, the king should lose his fine; for in that nature of suite hee cannot bee fined, and therefore the tenant is to take * his remedy by action upon the statute, wherein the king shall have his fine, &c.

(3) *Districiones facere.*] A heriot custome the lord may seise in the high-way, for that is no distresse but a seisure, but he cannot distrein for a heriot service there.

If the lord come to distrein, and see the beasts within his fee, and before he can distrein them, the tenant enchafe them into the high-way, the lord may, as hath beene said, distrein them there, for the cause above expressed.

The writ upon this statute shall be *contra pacem*, and not *vi et armis*.

The third branch:

(4) *Nisi domino regi et ministris suis, &c.*] Here is an exception of the kings prerogative (which by this act appears to be auncient) as well to distreine for his rent, or service out of his fee, and seignory, as in the high-way, or common street. But where it is said that the king may distrein out of his fee, that is, in the other lands of his tenant; it must be understood in such other lands as his tenant hath in his owne actual possession, and manured with his own beasts, and not in the possession of his lessee for life, yeares, or at will, for their beasts are not subject to such distresse.

There

2 E. 2.
Avow. 182.
44 E. 3. 20, 21.
6 R. 2.
Rescous. 11.
33 H. 6. 51.
2 E. 4. 6.
9 E. 4. 35.
16 E. 4. 10.

First part of the
Institutes, sect.
69.
F.N.B. 173, 174.
Inter leges Edw.
Regis. Lamb.
fol. 129.
Fiet. l. 2. cap. 42.
Artic. Cler. cap.
42. Regist. fol.
97.
19 E. 2. bre. 842.
21 E. 3. 11.
30 E. 3. 20.
41 E. 3. 6.
43 E. 3. 30.
11 R. 2.
Avowry 87.
36 E. 3. c. 9.
19 H. 6. 4.
35 H. 6. 6.
9 E. 4. 26.
F.N.B. 90. 173.
Lib. 8. fol. 60.
Bechers case.
11 R. 2. Avow.
87.

* [132]

17 E. 3. 1.

44 Aff. 32.
5 E. 3. 6.
13 E. 4. 6.

Artic. super
Cart. cap. 12.

There was a statute made in a parliament holden at Westminster in 51 H. 3. the yeare next before this parliament holden at Marlebridge, concerning distresses, consisting on two branches.

1. *Que nul home de religion ne auter soit distreine per ses beasts, queux gainont son terre, ne per ses barbits pur la det le roy, ne pur la det de auter home, ne pur auter encheson per les bailiffes le roy, ne per autres, tanque come ils trouve auters chateux sufficient dont ilz poient lever le det, ou que fussist sa demaund (forspris emparkement des beasts queux homes trouve seassants damage selonque le ley, usage, & le manner de la terre.)*

Artic. super
Cart. ca. 12.
27 l. Ass. 52.
28 Ass. p. 50.
29 E. 3. 23.
8 H. 4. 16.
11 H. 4. 2.
Lib. 11. fo. 44.
Godfreyes case.
Flores Histor.
Polyd. Virg. 22.
b. Regist.
Lucubr. Ockham.

2. *Et que distresses soient reasonable a la mountaince de la det, ou de la demaunde solong; bone value, & per estimation ne pas outragious des vicines, & nemi per estrangers. Of both these shall be spoken together, because divers of the authorities extend to both.*

Beasts queux gainont son terre & ses berbits.

This law had his foundation of the auncient law before the conquest, *Dunvallo Mulmutius* prohibited that the beasts of the plough should be distreined, &c. and gave priviledges to temples and ploughs: and Ockam, that wrote before this statute of the kings debts, faith, *Bobus tamen arantibus, per quos agricultura solet exerceri, quantum poterint parcant, ne ipsa deficiente debito amplius in futurum egere cogatur, quod si nec sicquidem summa quæ requiritur exurgit, nec arantibus parcendum est.*

Bracton, lib. 4.
fo. 217.
Fleta, li. 2. c. 42.

Bracton treateth of both these branches notably, and hee divideth *animalia* into *laboriosa* et *otiosa*, and faith, *Fit districtio injuriosa ordine non observat, si fiat districtio per oves, et sunt quæ ad minus damnum distringantur animalia otiosa; item ordine non observat si fiat districtio per boves, ut culturam auferant vel impediunt, cum sint alie res et animalia otiosa quæ sufficiant ad districtionem; item si subfit causa et observetur ordo, adhuc potest esse injuriosa, si fuerit nimia, et districtio modum excedat in qualibet specie.*

Lib. 2. cap. 42.

And Fleta faith, *Quod pro communi utilitate communitatis regni inhibitory fuer' ne quis distringeret alium per oves suas vel per averia sua carucarum, quamdiu alia sufficiens districtio inveniri possit.*

Districtiones sint rationabiles et non nimis graves. See before Chapter 4.

[133]

Brit. fo. 35. &
133. b.

29 ass. pl. 49.

And Britton faith, *Ou si ascun viscount eit pur malice fait prendre plus des avers pur nostre det, ou pur autre, que a la vailance de le det, ou sil eit prist beasts des carues, ou motons, ou berbis, ou vessel, ou mounture, ou robes, ou deins meson la ou auter distres poct trover sufficientment et hors de meason. And in another place he faith, Si ascun distreine auter per que gainage est disturbe, &c.*

Lege Executores
& Auten.

And this agreeth with the civill law, *Executio fieri non potest in boves, aratra, aliave instrumenta rusticorum quatenus alia bona habent.*

W. 2. cap. 18.
Fleta, lib. 2. c. 55.

The statute of W. 2. which giveth the *elegit*, doth absolutely except the beasts of the plough in these words, *Exceptis bobus et asfris caruæ.*

Regist. 97. temps
E. 1. avowry 230.
18 E. 2. acc' lur
testat. 35.
4 E. 3. 1.
29 E. 3. 16, 17.
P. 17 H. 6. Rot.
93 in com.
banco.
F.N.B. 174. b.
14 El. Dy. 312.

This statute doth not extend onely to distresses betweene lord and tenant, but also to all other distresses whatsoever, as well at the kings suit, as at the suit of the subject, so there be other goods sufficient; also to all manner of executions, as well at the suit of the king, as of the subject, with the like caution as is afore said.

And an action upon this statute doth lie, as well after deliverance, as before, for the cause of the distreining may be lawfull, and yet notwithstanding if he take the beasts of the plough where he might

might find others, the distresse is wrongfull. And albeit the tenant after such a distres taken pay the rent, and thereby affirme the cause of distres lawfull, notwithstanding this doth not purge the offence against this statute.

And the statute is to be construed, that at the time of the distres, &c. there must be other cattell sufficient, and it is not materiall what was before or after. 29 E. 3. 17.
4 H. 7. 8. b.

The writ upon this statute also shall be *contra pacem, et non vi et armis*. 17 E. 3. 1.

Now where the statute speaks of the beasts of the plough, and not of the plough it selfe: by the common law alwayes used the plough or any thing belonging to it was not distreinable, so long as any other distres might be taken.

This statute of 51 H. 3. being of record and in print, I thought to touch specially so much thereof as concerne distresses, whereof our statute of Marlebridge hath treated both in the fourth, and this fifteenth chapter.

And it appeareth by the Mirrour, that many other beasts and living things, and other goods were not distreinable by the common law, if there were other goods sufficient. As for mort goods, a covenable distresse is not of armour, or vessell, or apparell, or jewels, so long as there are other sufficient or covenable; nor of sheep, saddle horse, beasts of the plough, poultry, fish, or salvage, *ut supra*.

See Art. super
cart. cap. 12.

Mirror cap. 2.
§ 16.
Vce de Name.

CAP. XVI.

* [134]

SI hæres aliquis post mortem antecessoris (1) sui infra ætatem extiterit, et dominus suus custodiam terrarum, et tenementorum suorum habuerit, si dominus ille dicto hæredi, cum ad legitimam ætatem pervenerit, terram suam sine placito reddere noluerit, hæres ille terram suam per assisam mortis antecessoris recuperabit, una cum dampnis suis, quæ sustinuerit propter detentionem illam a tempore quo fuit legitimæ ætatis. Et si hæres aliquis tempore mortis antecessoris sui plenæ ætatis fuerit (2), et ille hæres apparens, et pro hærede cognitus et inventus sit in hæreditate illa, capitalis dominus * eum non ejiciat, nec aliquid sibi capiat, vel amoveat, sed tamen inde simplicem seisinam habeat pro recognitione domini sui ut pro domino cognoscatur (3). Et si capitalis dominus hujusmodi hæredem (4) extra seisinam malitiosè teneat, propter quod breve mortis antecessoris, vel consanguinitatis

IF any heir after the death of his ancestor be within age, and his lord have the ward of his lands and tenements, if the lord will not render unto the heir his land (when he cometh to his full age) without plea, the heir shall recover his land by assise of mortdauncester, with the damages that he hath sustained by such withholding, since the time that he was of full age. And if an heir at the time of his ancestor's death be of full age, and he is heir apparent, and known for heir, and be found in the inheritance, the chief lord shall not put him out, nor take, nor remove any thing there, but shall take only simple seisin therefore for the recognition of his seigniory, that he may be known for lord. And if the chief lord do put such an heir out of the possession maliciously, whereby he is driven to purchase a writ of mortdauncester, or of cou-
senage,

sanguinitatis oporteat ipsum impetrare, tunc dampna sua recuperet sicut in assise novæ disseisinæ. De hæredibus autem, qui de domino rege tenent in capite (5), si observandum est, ut dominus rex primam inde habeat seisinam, sicut prius inde habere consuevit (6). Nec hæres nec aliquis alius in hæreditatem illam se intrudat, priusquam illam de manibus domini regis recipiat (7), prout hujusmodi hæreditas de manibus ipsius et antecessorum suorum recipi consueverit temporibus elapsis. Et hoc intelligatur de terris et feodis, quæ ratione servitii militaris (8), vel serjantie, sive juris patronatus in manibus domini regis esse consueverunt. Vide Prærogativa cap. 3. Et Glanvil. lib. 7. cap. 9. fol. 4.

senage, then he shall recover his damages as in assise of novel disseisin. Touching heirs, which hold of our lord the king in chief, this order shall be observed, that our lord the king shall have the first seisin of their lands, like as he was wont to have before time: neither shall the heir, nor any other, intrude into the same inheritance, before he hath received it out of the king's hands, as the same inheritance was wont to be taken out of his hands and his ancestors in times past. And this must be understood of lands and fees, the which were accustomed to be in the king's hands by reason of knights service, or serjeanty, or right of patronage.

(17 Ed. 2. stat. 1. c. 3. 12 Car. 2. c. 24.)

Abridg. ass. 120,
b. F.N.B. 196. f.
Glanv. li. 7. c. 9.
Bract. li. 4. fo.
252, 253.
Brit. fo. 178. b.
Fleta, li. 5. ca. 1.
10 E. 4. 9, 10.
per Curiam.
8 E. 3. 63.
10 E. 3. 41.
11 E. 3. ass. 87.
12 E. 3. ass. 86.
12 ass. p. 21.
13 E. 3 tit.
Assise 92.
28 ass. p. 11.
34 ass. p. 10.
39 E. 3. 28.
2 E. 4. 38.
18 E. 4. 25.
Temps H. 8. Br.
tit. ten' à vo-
lunt. 15.
*46 E. 3 fo. 20.

Glanvil } ubi
Bracton } supra.
Fleta }

(1) *Si hæres aliquis post mortem antecessoris, &c.*] This act is but a declaration of the common law, for in this case when a gardein in chivalrie holdeth over, he is an abator, which is manifestly proved by this act, whereby it is declared that the attise of *mord'* doth lie against him. Also it is so resolved in our books, wherein this diversitie is to be observed, that where a man commeth to a particular estate by the act of the partie, there if he hold over; he is a tenant at sufferance; but where he commeth to the particular estate by act in law, as the gardein in our case doth, there he is no tenant at sufferance, but an abator. *Vide* 1. part of the Instit. sect. 461.

And yet for the benefit of the heire to some purpose, the possession of the gardein is the actuall seisin of the heire, for if the gardein be ousted, and he disseised, he shall have an assise, as it is holden in 2 E. 4. 5. b.

* If a woman bring a writ of dower against a gardein, and recover without title, the heire shall have an assise of *mord'* at his full age at the common law, notwithstanding the possession of the gardein.

(2) *Et si hæres aliquis tempore mortis antecessoris plenæ ætatis fuerit.*] This is the second clause of this chapter, and is also a rehearfall of the common law.

(3) *Simplicem seisinam habeat pro recognitione domini sui, ut pro domino cognoscatur.*] This is understood of the payment of reliefe, whereby he putteth the lord in seisin, and doth acknowledge him for his lord, so as of ancient time, and in ancient books, reliefe is called *simplex seisin*.

(4) *Et si capitalis dominus hujusmodi hæredis.*] This is the third clause, and is evident.

(5) *De hæreditatibus autem quæ de domino rege tenentur in cap. &c.*] This is the fourth clause of this chapter, and is also a rehearfall

hearfall of the common law, in which claufe are thefe words, *Sicut prius inde habere confuevit*, and thefe words, *prout hujusmodi hæreditas de manibus ipsius et antecessorum suorum recipi consueverit*.

(6) *Ut dominus rex primam inde habeat seisinam, sicut prius habere consuevit.*] Note, in the former claufe concerning the tenure of subjects, the lords should have *simplicem seisinam*, i. *relevium*: but in this claufe where the tenure is of the king in capite, and his tenant dieth, his heire of full age, he saith not that he shall have *simplicem seisinam*, but *primam liberam seisinam*, whereof you may reade at large in Stamford Prerog. 11. b.

(7) *Priusquam illam de manibus domini regis recipiat.*] That is, before he sueth his livery out of the kings hands, albeit he be of full age at the death of his auncester, whereof you may reade at large in Stamford, *ubi supra*.

(8) *Et hoc intelligatur de terris et feodis quæ ratione servitii militaris, &c.] i. Servitii militaris in capite, serjantiæ. i. magnæ serjantiæ, five juris patronatus. i. fundationis episcopatum, monasteriorum, &c.* Prerog. regis, c. 3.

CAP. XVII.

PROVISUM est insuper, quod si terra quæ tenetur in focagio, sit in custodia parent' hæred', eo quod hæres infra ætatem extiterit, custod' illi vastum facere non possunt (1), nec venditionem nec aliquam destructionem de hæreditate illa, sed salvo eam custodiant ad opus dicti hæredis, ita quod cum ad legitimam ætatem pervenerit, sibi respondeant (2) de exit' dictæ hæreditatis, per legalem computationem, salvo ipsis custodibus rationabilibus misis suis. Nec etiam possunt dicti custodes maritagium dicti hæredis dare (3) vel vendere, nisi ad commodum dicti hæredis: sed parentes dicti hæredis propinquiore, qui hujusmodi custodiam habuerint, à toto tempore illo à quo breviam conceduntur implacitandi, hujusmodi custodias habeant ad commodum hæredum, ut prædictum est, sine vasto, vel exilio, vel destructione faciendi.

IT is provided, that if land holden in focage be in the custody of the friends of the heir, because the heir is within age, the guardians shall make no waste, nor sale, nor any destruction of the same inheritance; but safely shall keep it to the use of the said heir, so that when he cometh to his lawful age, they shall answer to him for the issues of the said inheritance by a lawful accompt, saving to the same guardians their reasonable costs. Neither shall the said guardians give or sell the marriage of such an heir, but to the advantage of the foresaid heir; but the next friends which had the ward, for all that time that writs of impleading did not lie, shall have such wardship unto the advantage of the heir, as is said before, without waste, sale, or destruction making.

(Fitz. Wast. 1. 9. 100. 107. Fitz. Present. 10. Fitz. Brief, 847. Fitz. Gard. 159. 166. Plowd. 293. Fitz. Accompt. 35. 59. 60. 77. 107. 1 Inst. 87. a. Lib. Ent. 47. Raft. 21.)

(1) *Vastum facere non possunt.*] The heire within age shall have an action of waste against the gardein in focage, but he shall not be punished for waste made by strangers.

(2) *Cum ad legitimam ætatem pervenerit, sibi respondeat.*] This second

2 E. 2. Wast. 1.
16 E. 3. Wast.
100. 28 H. 6.
Wast. 9.
F.N.B. 59. g.

Vide Mag. Ch.
c. 4. & Glouc.
c. 5
See the first part
of the Institutes,
sect. 124.

second clause is a declaration of the common law: the lawfull age of * the heire of a tenant in focage is the age of 14 yeares, and at that age he shall have an action of account against his gardein; all which you may reade at large in the first part of the Institutes, sect. 104. See also there the severall ages of men and women.

(3) *Nec etiam possunt dicti custodes maritagium dicti hæredis dare, &c.*] This is the third clause of this act, in affirmance also of the common law. Vide the first part of the Institutes for this clause, sect. 124.

C A P. XVIII.

NULLUS escaetor, vel inquisitor
(1), aut justiciar' ad assisas aliquas
specialiter capiendas assignatus, vel ad
querelas aliquas audiendum et terminan-
dum, de cætero habeant potestatem ali-
quam amerciandi pro defaltis communis
summonitionis, nisi capitales justiciarii,
vel justic' itinerantes (2) in itineribus
suis.

NO escheator, commissioner, or
justicer specially assigned to
take assises, or to hear and determine
matters, from henceforth shall have
power to amerce for default of
common summons, but the chief
justices, or the justices in eyre in
their circuits.

Glanv. li. 9. c. 10. Fleta, li. 1. cap. 43.

(1) *Inquisitor.*] Enquiror, that is to say, sheriffe, coroner *super visum corporis*, or the like, that have power to enquire in certaine cases.

Britton, fo. 4.

The mischief before this statute was, that the eschaetor, sheriffe, coroner, speciall justices of assise, and justices of oier and terminer, in speciall cases (whom Britton calls simple enquirors) would upon the common summons amerce such as made default. Now this statute takes away their power to amerce, *Nullus, &c. habeant potestatem amerciandi pro defaltis.*

Vide hic c. 24.

Brit. fol. 4.

Glanv. li. 9. c.

11.

10 E. 3. fol. 9.

2 H. 4. 24.

8 H. 4. 16.

11 H. 4. 8.

But this extendeth not to sheriffes in their tournes, nor to stewards in leets, notwithstanding that they be inquirors, for that they deale with common nufances, or matters concerning the publique, and not in private causes, and therefore are not restrained by this statute.

(2) *Nisi capitales justiciarii, vel justiciarii itinerantes.*] That is, justices of general assises, whose authority increasing by divers acts of parliament, and comming twice every yeare where the justices in eire came but from seaven years to seaven years, the authority of justices in eire by little and little vanished.

So as if any amerciament is to be made for default upon common summons, upon due certificate made thereof to the justices of assise (here called *capitales justiciarii*, in respect that speciall justices of assise were named before) they may amerce upon such defaults, but the escheator dealing *virtute officii*, did after this statute certifie the defaults into the exchequer, and there was the amerciament imposed; which is worthy of observation.

Britton, fo. 1.

cap. 4.

Fleta, l. 1. c. 43.

And this exposition agreeth with Britton, who wrote soone after this statute, (*et contemporanea expositio est fortissima in lege*) and faith,

Et

Et ceux que avoient estre summons, et ne viendront a cels enquests des coroners, volons q. ils soient in nostre mercie, a la venue de nous justices as premiers assises en cel countie, si tielz defaults trouvant entres en rol de coroner. Issint que nous coroners, ne nous escheators, ne simples enquirers, ne eient poer de nulluy amercier pur nul defeaute.

C A P. XIX.

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DE *essoniis* (1) autem provisum est, quod in comitatu, hundred^o, aut in curia baronis, vel aliis curiis (2), nullus habeat necesse jurare pro *essonio* suo warrantizando (3). Vide Glanv. lib. 1. cap. 12. fol. 4.

TOUCHING *essoins*, it is provided, that in counties, hundreds, or in courts barons, or in other courts, none shall need to swear to warrant his *essoin*.

Fleta, lib. 6. ca. 10. (Fitz. *Essoin*, 119. Raft. 297.)

By the order of the common law, for that *essoins* which were first instituted upon just and necessary cause, should not be used upon feigned causes for delay, he that cast the *essoin* ought to be sworne, that the cause thereof was just and true, and this held in all the five *essoins* before mentioned, cap. 12. and this appeareth in Glanvill, *Essoniator probabit quodlibet essonium jure jurando propria et unica manu, &c.* But yet at the common law an oath was not alwayes required in that case; *Non autem omnes essoniatore ad diem recipiend. affidabunt, sed illi tantum qui sunt baronibus inferiores, barones vero et baronissæ et eorum superiores, sicut comites et eorum attornati non affidabunt, sed plegios invenient, &c.* Ratio vero hujus diversitatis talis esse potest, quod ita nobiles et dignæ personæ in warrantizatione *essonii* non per se jurabunt, sed per procuratores, scilicet plegios suos, &c. And herewith agreeth other auncient authors.

(1) *De essoniis.*] This act speaketh generally of *essoins*, and yet it is particularly to be understood of one of the five *essoins*, and that is, of the common *essoin* *de malo veniendi*; so as in the *essoin* *de service le roy*, and the rest, he that cast the *essoin* must be still sworne; and this law hath beene thus interpreted for two reasons. 1. For that in the *essoin* *de service le roy*, and the rest, the delay is great, viz. a yeare and a day, &c. and therefore those *essoins* ought to be more precisely proved. 2. *Ad ea quæ frequentius accidunt jura adaptantur*: in those dayes those other *essoins* were very rare, and therefore the judges of the law, that ever hated delays, interpreted this act to extend to common *essoins* only, that had the least delay in it.

(2) *Vel in aliis curiis.*] These generall words are interpreted to extend to the kings courts of record at Westminster, and other courts of record, although the act beginneth with inferiour courts, as it is manifest by common experience; and the cause is, for that otherwise these generall words should be void, for it cannot according to the generall rule extend to inferiour courts; for none be more inferiour or lower than these, that be particularly named, and so note a just exception out of the generall rule.

(3) *Warrantizando.*]

Vide hic. ca. 12. & 13. Glanv. l. 1. ca. 12. Braet. li. 5. fol. 351. 352. Fleta, li. 6. c. 10. Britton, fo. 282. cap. 122. See the third part of the Institutes, cap. Perjury.

12 H. 4. 14. 2 E. 4. 16. l. 5 E. 4. 70. Vide Glouc. c. 8.

12 H. 4. 24. per Hankford. Fleta, lib. 6. cap. 10.

Lib. 2. fol. 46. Levesque de Cant. case. Vide hic ca. 28. W. 1. c. 3. 15, 26.

Braeton, li. 4.
fo. 352.
12 H. 4. 15, 24.

(3) *Warrantizando.*] *Est autem warrantizare, jurare quod ita detentus fuit ægritudine in veniendo versus curiam, quod venire non potuit.* This was the oath of him that cast the effoine at the common law before this act.

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CAP. XX.

NULLUS de cætero (excepto domino rege) teneat placitum in curia sua de falso judicio facto in curia tenentium suorum; qui hujusmodi placita specialiter spectant ad coronam et dignitatem domini regis.

NONE from henceforth (except our lord the king) shall hold in his court any plea of false judgement, given in the court of his tenants; for such plea specially belongeth to the crown and dignity of our lord the king.

(Fitz. Faux Judgement, 7, 8. 10. 14. 1 Ed. 3. stat. 1. c. 4. Regist. 15. Raft. 342. Co. Ent. 305.)

Before the making of this statute, if a false judgement had been given in a court baron, this should have been redressed in the court baron of the lord next above him, and so upward of the lords paramount, which both was an occasion of long delays, and the king had also many times prejudice thereby, for that those base courts could assesse no fine or amerciament to the king; which is so to be understood, that if the next immediate mesne had no court baron, the false judgement could not be redressed in the court of the lord next above, for default of privity, but then the false judgement was to be redressed in the court of common pleas, or before the justices in eyre: hereby shall appeare, how necessary it is to know what the common law was before the making of any, and especially of this statute, for without that this act could not be understood.

Regist. fol. 15.

This act consisteth on two branches, the first is negative, the other affirmative.

1. That none from henceforth (except the king) shall hold plea in his court of false judgement in the court of his tenants.

Hereby is implied that by the common law, the false judgement in a court baron was to be redressed in the courts of the lords above.

2. The affirmative is, because such pleas (of false judgment) specially belong to the crowne and dignity of our lord the king; this is a reason of the taking away of the jurisdiction of the superiour lords: and the effect of the reason is this; that in such proceedings, many times fines and amerciaments to the king were to be imposed, which did belong to the kings crowne and dignity, that is, to the kings courts of record, and not to inferiour courts of lords, that were not of record: and besides, if the judgment were reversed in the lords court, the suitors that gave the false judgement were to be amerced to the king, which the inferiour court could not doe.

Dier, 9 Eliz. 263.

And for that at the common law, for default of courts of superiour lords, the false judgement was to be redressed in the court of

of common pleas, therefore though the words be *excepto domino rege*, and *hujusmodi placita spectant ad coronam et dignitatem domini regis*, which might give a countenance to the kings court, *coram rege*, yet this statute taketh away no jurisdiction from the court of common pleas, that it had before this statute. And this doth Britton, who wrote soon after this statute, grounding himselfe upon this act; notably expresse in these words:

Et si faux jugement, ou faux proces soit trouve in le record, et la parol soit in counte, de ceo ne voilons nous my que le visc' ne les suiter eient conusans: mes plein soy, que greve se sentira, & face venter le proces & le record devant nous justices in banke, & illonques soit redresse le error si poient issint trove. Britton, fol. 59.

And the rule in the Register is,

Regist. fol. 15:

Si faux judgement soit donc en county, court baron, ou auter court nient enfranchise (i. nient de record) que ont conusans de plea, celui contre que judgement est done poet aver bre. de recorder la parole devant justices in banke on in eire. Et cest rule extend auxi bien in autre bre. come in bre. de droit, et la ou la parole est per bre. ou sans bre.

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And now the justices in eyre being (as hath been said) worn out, the originall writ of false judgement is retournable, *coram justiciariis nostris apud Westm'*: which are the justices of the court of common pleas. Regist. ubi supra.

C A P. XXI.

PROVISUM est etiam, quod si averia alicujus capiantur, et iniuste detineantur, vicecomes post querimoniam inde sibi factam (1); ea sine impedimento (3) vel contradictione ejus qui dicta averia ceperit, deliberare possit, si extra libertates capta fuerint. Et si infra libertates capta fuerint hujusmodi averia, et balivi libertatis ea deliberare noluerint (2); tunc vicecom' pro defectu ipsorum balivorum ea faciat deliverari.

IT is provided also; that if the beasts of any man be taken, and wrongfully withholden, the sheriffe, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties. And if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered.

Glanv. li. 12. c. 12. 15. Mirror, c. 2. § 16. Fleta, lib. 2. ca. 39. 1 E. 3. 11. b. Vide W. 1. c. 17. (Dyer, f. 245. Bro. Riots, 2, 3. Bro. Parliament, 108. Fitz. Return. de Viscont. 17. 1 Inst. 245. b. 13 Rep. 31. 3 Ed. 1. c. 17. Regist. 82, &c.)

The mischiefs before this statute were first when a mans beasts or other goods were distreined and impounded, the owner of the goods had no remedy but a writ of replevin, by which delay the beasts or other goods were long detained from the owner to his great losse and damage.

21 H. 6. tit. retourn. del Visc. 17. Dier Mich. 7 & 8. Eliz. 246.

Secondly, when the beasts or other goods were distreined and impounded within any liberty that had retourn of writs, the sheriffe was driven to make a warrant to the baylie of the liberty to

29 E. 3. 23. F.N.B. 58. b.

II. INST.

M

make

make deliverance, and that wrought a longer delay, for at the common law he could not enter into the liberty in that case.

A third mischief was when the distresse was taken out of the liberty, and impounded within: Now this statute doth apply cures to all these three mischiefs.

Mirror, c. 2. § 16.

8 E. 4. 14.

9 E. 4. 48.

14 H. 7. 9.

16 H. 7. 16.

21 H. 7. 23.

P.N.B. 69.

First part of the

Institutes, sect.

219. & 237.

* 21 E. 4. 66.

(1) *Post querimoniam inde sibi facta*, &c.] That is, the sheriffe upon a pleint made unto him without writ may either by paroll, or by precept, command his bayly to deliver them, that is to make replevin of them, and by these words *post querimoniam sibi facta*, the sheriffe may take a pleint out of the * county court, and make replevin presently (which he ought to enter in the county court) for it should be inconvenient, and against the scope of this statute, that the owner for whose benefit the statute was made, should tarry for his beasts to the next county court, which is holden from moneth to moneth.

And in a replevin by pleint, the sheriffe may hold plea in his county court, although the value be of 20l. or above, by force of this statute, but in other actions he shall hold plea under 40s.

30 E. 3. 23.

The usage of the county of Northampton is, that in the absence of the sheriffes baylie the frankpledge may make deliverance; note this.

Regist. 81. b.

If J. S. be sheriffe, and the distresse was taken by him, the writ or pleint shall be in common forme, naming the sheriffe by his christen name and surname, *que J. S. cepit*, and not *quæ tu ipse cepisti*, and the sheriffe in that case ought to make deliverance.

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(2) *Et si infra libertates, &c. balivi libertatis ea deliberare non luerint*.] Hereby it appeareth that when the distresse is taken and impounded within a liberty that hath retourne of writs, whether the matter be before the sheriffe by writ or by pleint, the sheriffe ought to make a warrant to the baylife of the liberty to make deliverance; whereunto if he make no answer, or retourne that he will make no deliverance, or the like, the sheriffe may by force of this statute, and the statute of W. 1. enter into the liberty, and make deliverance; and herewith agreeth Fleta.

W. 1. cap. 17.

F.N.B. 68. f.

Fleta, li. 2. c. 39.

§ 6 balivus.

Regist. 82.

Et si balivus alicujus habentis libertatem retorn' brevium postque vicecom' sibi precept' reg', vel aliud mandatum ex officio suo dependens averia, ut prædictum est, detenta non deliberet, vicecom' extunc habet ingressum, et faciat quod suum est, &c. Et eodem modo fiat deliberatio licet sine brevi suscepta securitate de prosequendo, &c.

And if the distresse be taken without the franchise, and impounded within, the sheriffe may upon pleint made, presently enter and make deliverance (without any precept to the bayly of the liberty) for the statute provideth that he shall replevy, *Si extra libertates capta fuer', et si infra libertates capta fuerint hujusmodi averia, &c.* So as there is no precept to be directed to the bayly of the liberty, but where the distresse was taken within the liberty; and where the distresse was taken out of the liberty, there by the expresse words of the statute the sheriffe may enter and make deliverance presently.

31 E. 3. gager

deliverance. 15.

(3) *Sine impedimento, &c.*] A man by deed makes a lease for yeares, reserving a rent with a clause of distresse, and to detain the distresse against gages and pledges untill grece be made, yet the sheriffe, or bayly of the liberty, as the case requires, ought to make deliverance of such a distresse.

Note

Note the original writ of *repleg'* is in nature of a *justicies*, and is not retournable; and in a *justicies* no consufance can be demanded, because none can demand consufance, but he that hath a court of record, and of a plea in a court of record; but the county court, though the plea be holden therein by a *justicies* the kings writ, yet is it no court of record, for of a judgement therein there lieth a writ of false judgement, and not a writ of error: also if the sheriffe should graunt the consufance, he could not award a resummons; and the lord of the franchise can demand no consufance in a replevin.

And yet divers lords of hundreds, and court barons have power to hold plea, *de vetito namio*, in old books called *de vee*: for the better understanding of this act, and of divers auncient acts of parliament, books, and records, it is good to know what the genuine sense of *vetitum namium* is, wherein many have erred. *Namium* signifieth a taking, or distresse, and *vetitum* is forbidden, and properly it signifieth when the bayly of the lord distreineth beasts or goods, and the lord forbiddeh his bayly to deliver them when the sheriffe comes to replevy them, and to that end to drive them to places unknowne, or to take such a course as they should not be replevied: but it is also called a distresse, that is forbidden *vetitum namium*, when without any words they are eloigned, or so handled by a forbidden course, as they cannot be replevied; for then they are forbidden in law to be replevied.

Now by this it appeareth how they erre, that take it, that beasts or goods taken in withernam should be beasts or goods taken in *vetito namio*, for *vetitum namium*, or *vetitum namii* is unlawfull, for whether the distresse were lawfully taken or no, yet the forbidding of them against gages and pledges to be replevied, out of question is unlawfull. But the beasts in withernam are lawfully taken by authority of law, in lieu of those that were distreined and forbidden to be replevied, and the writ or precept of withernam reciteth, *Quod postquam predict' B. averia predict' A. cepit, et in comit' tuo ea fugavit, &c. per quod ea eidem A. replegiari non potuisti, nos malitie ipsius B. obviare volentes in hac parte tibi præcipimus quod averia predict' B. in baliva tua cap' in withernam, et ea detineas donec eidem A. averia sua prædict' secundum legem et consuetudinem regni nostri replegiari possis, &c.* So as the taking in withernam is a lawfull taking by authority of law, and therefore cannot be termed a taking forbidden, for that it is expressly commanded to be done, and this agreeth with our old bookes. Hereof Bracton saith, *Si autem averia capiuntur per servientem domini (sine judicio curiæ) et postea petita fuerint ab ipso domino, cum præsens fuerit, et ipse ea vetuerit per vadium et plegium, uterque tenebitur, ut videtur, unus de captione, et alter de vetito namio; et licet dominus ipse advocaverit captionem servientis, servientem non liberat sed onerat seipsum, et uterque tenetur de facto servientis, serviens quia cepit, et dominus dupliciter, quia advocat factum servientis, et quia vetat: item sunt qui dicunt, quod non tenetur quis respondere de vetito, antequam convincatur captio injusta, ad quod dico, quamvis captio justa, vel injusta, tamen vetitum semper erit injustum.*

And in W. 2. *placita de vetito namio*, is intended a power to hold plea of taking of distresses, and forbidding of them to be replevied, as clearly appeareth by the words of that act, and cannot be intended of pleas of withernam.

34 H. 6. 48.

F.N.B. 73. b.
Reg. Orig.
12 H. 7. 8, 9.See W. 2. ca. 2.
F.N.B. 73.Bracton, lib. 3.
fol. 155. b.Regist. 82, 83.
79, 80.
F.N.B. 73.

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Bract. li. 3. 158.
155. b. 157. a.
sect. 6. Wi-
thernā.

W. 2. cap. 2.

Mirror, ca. 2.

§ 16.

De vee de naam.

De vee sont 2. manners, lun quant un vee vive naam, &c. contre gages, & pledges suffisant, lauter quant lun ne fustier my soy estre distrein a droit, & lun & lauter sont personel trespasses contre la peace.

Vee is an old French word, and is as much to say, as *vetitus*, or forbidden.

Naam nest autre chose que *reasonable distresse*; it commeth of the Saxon word *nemmen*, or *nammen*, to take hold on, or distrein, whereof comes *namium*, i. *captio*, and so *vetitum namium* signifieth in law a distresse, or taking forbidden to be replevied.

Now seeing withernam hath been mentioned, you shall finde that the true sence of the word is a proove of the aforesaid matter, for it is compounded of two old Saxon words, *viz. weder*, which common speech hath turned to *oder*, or *etber*; and *naam*, that signifieth, as hath been said, a caption, or taking, and therefore is as much as a taking, or a reprisall of other goods in lieu of them that were formerly taken and eloigned or withholden, and this is *capere in withernam*, whereof the Register speaketh, and well expoundeth, which now you see clearly is just and lawfull.

Lambard verbo
Withernam.

And therefore one speaking of withernam, and condemning the aforesaid error, saith, *Verum maximam mihi admirationem movet introducta nominis depravatio, quæ withernam vetitum (cum potius iteratum sonat) namium dicit.*

F.N.B. 89. u.

Regist. Vide

Bract. ubi supra.

And albeit the distresse were lawfull, yet by matter, *ex post facto*, it may be called *vetitum namium*, a wrongfull taking: for when (for example) he that distreineth them cloigneth them, so as they cannot be replevied, the owner shall have an action of trespassse, *quare vi et armis, averia ipsius A. cepit et ea ad loca ignota fugavit ita quod averia illa eidem A. secundum legem et consuetudinem regni nostri replegiand. inveniri non poterit*: whereby it appeareth, that by the matter subsequence, the first distresse is in this sence, and to this effect, termed unlawfull.

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CAP. XXII.

NULLUS de cætere possit distringere libere tenentes suos ad respondendum de libero tenemento suo, nec de aliquibus ad liberum tenementum suum spectantibus (1), nec jurare faciat libere tenentes (2) suos contra voluntatem suam, quia hoc nullus facere potest sine præcepto domini regis.

NONE from henceforth may distrain his freeholders to answer for their freeholds, nor for any things touching their freehold, without the king's writ: nor shall cause his freeholders to swear against their wills; for no man may do that without the king's commandment.

15 R. 2. cap. 2. 16 R. 2. cap. 2. (15 R. 2. c. 12.)

Rot. claus.

18 H. 2. m. 10.

in Havering.

This act is confirmed and enlarged by the statute of 15 and 16 R. 2.

Before this statute, lords would distraine their free tenants to come and shew the deeds, specially the originall deed, whereby they might know by what rent and services the tenancie was holden of them, and obliquely many times perusing the deeds (which are the secrets and sinews of a mans land) brought in question the title of the

the free-hold it selfe. Another mischiefe was, that the lords of court barons, hundreds, &c. where the suitors were judges, would constraine them to sweare betweene partie and partie, both which mischiefs are taken away by two severall branches of this act.

(1) *Ad liberum tenementum suum spectantibus.*] By these words are intended the charters or tenure of their lands, for they doe properly belong to the free-hold; and if the freeholder be distrained contrary to the purview of this statute, he shall have a writ of prohibition grounded upon this act, *Cum de communi consilio regni nostri Angliæ statutum sit, quod nullus distringere possit libere tenentes suos ad respondendum de libero tenemento suo, nec de aliquibus ad liberum tenementum suum spectantibus, &c. Tibi præcipimus quod non distringas ad respondendum, &c.*

And it appeareth by the Register, that this act doth bind the king, for there is a writ directed to the kings bailiffes of his manor of N. the words whereof be, *Vobis præcipimus, quod non distringatis A. ad respondendum coram vobis in curia nostra prædicta de libero tenem' suo, nec de aliquibus ad liberum tenementum suum spectantibus.* And if the kings bailiffe doth not obey this writ, the tenant shall have an attachment against him, which also appears in the Register.

(2) *Nec jurare facit libere tenentes.*] This is to be understood betweene partie and partie; but to enquire for the lord of all the articles belonging to the court baron or hundred, they may be sworne, and so are the books to be understood. Hereof you may reade a notable record in 14 E. 1. in Banco, &c.

*Gilbertus de Pincebek & Richardus filius Guilielmi de Spalding implacitaver' Priorem de Spalding pro eo quod cum sint liberi homines, & terras & tenementa sua tenent liberè, ipse Prior distringit eos ad corporale sacramentum præstand' sibi sine præcepto regis, contra legem & consuet' regni regis, & contra * prohibitionem, &c. Prior dicit quod habet libertatem & regalitatem, quod si quis captus fuerit cum latrocinio, quod ipse per balivos suos in curia sua inde habet cogn'. Et quod super captionem furis cum manuoperè dictum fuit dictis Gilberto & Richardo, quod ad rei veritatem inde inquirend' præstarent sacramentum, qui illud facere recusarunt, unde dic' quod per considerationem curiæ prædictæ fuerunt ipsi districti propter contemptum prædicti judic'. Et quia in casu hujusmodi liber homo in curia domini sui corporale debet sacramentum præstare, si per consuetudinem ejusdem curiæ ad hoc electus fuerit, & idem Gilbertus & Richardus non possunt dedicere, quin per consuetud' ejusdem curiæ ad hujusmodi corporale sacramentum electi fuerunt. Considerat' est, quod Prior sine die, & hab' return' quæriorum, & ipsi Guilielmi & Richardi in misericordia.*

But in the leet or tourne, the suitors may be compelled to be sworne as well for the king, as betweene partie and partie; for they are not liberè tenentes, as this statute speaketh, in respect of tenure, but doe their suit in respect of resistance; also the leets and tournes are the courts of the king and of record; and the court baron and hundred court of other lords are not courts of record.

The rule of law is, that whensoever any man hath any thing of common right and by course of law, the same may well be enlarged by custome and prescription; as the lord of a manour that hath a court baron, of common right and by course of law all pleas therein are determinable by wager of law, and yet by prescription the lord may prescribe to determine them by jurie. And this branch

Regist. 171.

27 ass. p. 6. 20.
39 E. 3. 20.
12 H. 4. 8. b.
F.N.B. 75. c.

M. 14. E. 1.
rot. 19.
Lincoln.

* That is this statute.

A freeholder refuse to present for the lord.

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The custome of the court.

39 E. 3. 35.
44 E. 3. 19.
F.N.B. 75 E.

12 H. 7, 8, 9.

Regist. 171. b.

doth binde the king in his court baron, hundred or countie court.

Bract. li. 3. fo. 106.

Of both these articles Bracton saith thus, *Non potest aliquis baro, vicecomes, vel alijs de liberis tenementis cognoscere, nec tenens tenetur respondere sine præcepto vel warranto domini regis, nec etiam possunt aliquem ad sacramentum sine warranto compellere.*

Glanv. li. 12. c. 2, 3. &c. Bract. li. 5. fo. 328. Brit. cap. 120. Fleta, li. 6. c. 3. Regist. fo. 1. F.N.B. fo. 1.

In a writ of right patent directed to the lord of the manour, plea shall be holden of freehold, and the court in that case may give an oath, for there is the kings writ of *præcipe quod reddat*, which is *præceptum domini regis*. Of this you shall reade plentifully in our old books, and it properly belongeth to another treatise. And note these words in our act, *Sine præcepto domini regis*, doe refer to both clauses.

C A P. XXIII.

PROVISED est etiam, quod si balivi (1), qui compotum suum dominis suis reddere tenentur, se subtraxerint, et terras vel tenementa non habuerint (2), per quæ distringi possunt, tunc per eorum corpora attachientur, ita quod vicecomes in cujus baliva inveniuntur, eos venire faciat ad compotum suum reddend.

IT is provided also, that if bailiffs, which ought to make account to their lords, do withdraw themselves, and have no lands nor tenements whereby they may be distrained; then they shall be attached by their bodies, so that the sheriff, in whose bailiwick they be found, shall cause them to come to make their account,

(Fitz. Brief, 791, 806. Fitz. Process, 203. Fitz. Exigent, 12. 1 Roll. 182.)

The mischief before this statute was, as it appeareth by the letter thereof, that the last proces in an action of accompt was distress infinite, and the accomptants seeking subterfuges did withdraw themselves and become vagrant, flying to secret places, sometimes in foreine counties, and had no lands or tenements whereby they might be distrained, so as the lords were in a manner remediless.

Regist. 72. 136. F.N.B. 117. h. Fleta, li. 2. c. 64. Brit. fo. 163. b. Mirr. c. 2. § 17. de contracts, &c. 5. § 3.

This act doth give to the lord a writ of account, founded upon this statute, which of the words of the writ is called a *monstravit de compoto*, and beginneth thus: *Monstravit nobis A. quod cum B. balivus suus, &c.* Of which writ you may reade in the Register, in Fleta, and other ancient books and records, and lyeth in any county where the accountant may be found.

[144] Britton ubi sup. 17 E. 2. Proc. 203. 18 E. 2. avow. 220. 17 E. 3. 59. Regist. 137.

(1) *Balivi.*] This statute extends not onely to bailiffes according to the letter, but to gardeins in socage, receivers, and other accountants: but the statute of W. 2. c. 11. extends onely to bailiffes and receivers, and not to a gardein in socage; for a *capias* lyeth against him by this statute, but no exigent by the statute of W. 2.

W. 2. cap. 11. Regist. 136. F.N.B. 118.

And where some have supposed, that the statute of W. 2. which giveth proces of utlagary in an action of account, hath taken away either the effect or the use of this act, the contrary appeareth in that

that case, and in other cases in our books, as hereafter shall appeare.

(2) *Et terras et tenementa non habuerint.*] If the accomptants have any lands or tenements, whereby they might be distrained, though it be not to the value of the account, yet it sufficeth to exempt them out of this statute, but they must have lands and tenements for terme of life at the least, and so is this act to bee understood.

For proof whereof; after this statute, and after the said statute of W. 2. cap. 11. *viz.* in 4 E. 2. one brought a writ of *monstravit de compoto* upon this statute, and counted that he was his receiver of C. l. &c. In which action foure points were resolved. 1. That our statute extendeth to a receiver as well as to a bailife. 2. That if the accountant hath any lands or tenements, though they be not sufficient to render the account, yet he is exempted out of the statute. 3. By these words [lands and tenements] is intended an estate of freehold; and therefore where it was there found that the accountant had a house of the yearly value of vi. s. in the right of his wife, who had the inheritance thereof, but for that it was the freehold of his wife, and not his freehold, it was adjudged no sufficiencie within the statute. 4. Lastly, it was resolved, that if the husband had issue by his wife, so as he had a franktenement for his life, he had beene exempted out of the statute. And the like case was in 6 E. 2. in case of a receiver, and many other authorities and records there be to that effect, whereby it appeareth that both this act hath still his effect, and that it was in use after the stat. of W. 2. cap. 11. And herewith agreeth Fleta, which wrote soone after the statute of W. 2. and that statute doth confirme this act, *Et si diffugerit, et gratis compotum reddere noluerit, sicut in aliis statutis alibi continetur*: by which words this statute is meant.

And good use may be made of this writ of *monstravit de compoto*, if the plaintife can learne in what place or countie he lurketh, but he cannot have this writ *sed per fidem, quam præstare debet in cancellaria, &c.*

But if any sue out this writ of *monstravit de compoto*, and attache the accountants body, where he hath lands and tenements, contrary to this act, in *deceptionem curiæ contra formam statuti, &c.* the party grieved shall have a writ for his reliefe, which appeareth in the Register,

4 E. 2. breve 791.

6 E. 2. breve 806.
17 E. 2. Proc. 203.
17 E. 3. 59.
F.N.B. 118.
Flet. li. 2. c. 64.
Britton ubi sup.

F.N.B. 118.
Regist. 136, 137.

Regist. 137.

C A P. XXIV.

ITEM firmarii (1) tempore firmarum suarum vastum, venditionem, vel exilium (2) non facient (3) de domibus, boscis, vel hominibus, nec de aliquibus ad tenementa quæ ad firmam habent spectantibus (4), nisi specialem inde habuerint concessionem (5), per scriptum conventionis mentionem faciens quod hoc facere possunt. Quod si fecerint,

ALSO fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special licence had by writing of covenant, making mention, that they may do it; which thing if they do, and thereof be convict, they shall

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rint, et super hoc convincantur, dampna plena restituant, et per misericordiam graviter puniantur (6).

shall yield full damage, and shall be punished by amerciamēt grievously.

See the statute of Glouc' c. 8. (Mirror, 320. 5 Rep. 18. Dyer, f. 281. Fitz. Wast. 12. 22. 30. 32. 37. 42. 43. 46. 47. 48. 53. 68. 69. 76. 78. 82. 88. 4 Rep. 63. Rast. 689. 6 Ed. 1. stat. 7. c. 5.)

The mischief before this statute was, that against lessees for life or years, there lay no prohibition of waste at the common law, because they came in by the act of the lessor, and he might have provided upon the making of the lease, against waste to be done, and he that might and would not provide for himself, the common law would not provide for: otherwise it is of estates created by law, as tenant in dower, and the gardien; but seeing waste and destruction is hurtfull to the common-wealth, this act provideth remedy for waste done by lessee for life, or lessee for yeares, and it is the first statute that gave remedy in those cases: for the rule of the Register is, that there are five manner of writs of wastes, viz. two at the common law, as for waste done by tenant in dower, or by the gardien; and three by statute, or speciall law, as against tenant for life, tenant for yeares, and tenant by the courtesie.

(1) *Firmarii.*] For the word *firma*, whereof *firmarius* commeth, see the first part of the Institutes, sect. 1.

Here *firmarii* doe comprehend all such as hold by lease for life, or lives, or for yeares, by deed or without deed: *large se habet hæc dictio firmarius ad terminum vitæ, et ad terminum annorum*; and so much Fleta saith, *de termino*.

Albeit the Register saith, *Sciend'*, that *per statutum de Marlebridge, cap. 23. data fuit quedam prohibitio vasti versus tenentem annorum*, which is true, though the statute doth extend to farmers for life also, but this act extended not to tenant by the courtesie, for he is not a farmer, but if a lease be made for life or yeares, he is a farmer, though no rent be reserved.

(2) *Vastum, venditionem, vel exilium.*] Of these you shall reade in the first part of the Institutes. But a reason is required, that seeing as well the estate of the tenant by the courtesie, as the tenant in dower are created by act in law, wherefore the prohibition of waste did not lie as well against the tenant by the courtesie, as the tenant in dower at the common law; and the reason is this, for that by having of issue the state of tenant by the courtesie is originally created, and yet after that he shall doe homage alone in the life of his wife, which proveth a larger estate; and seeing at the creation of his estate he might doe waste, the prohibition of waste lay not against him after his wives decease, but in the case of tenant in dower, she is punishable of waste at the first creation of her estate: the prohibition of waste lay not against tenant in taile *apres possib.* (whose state was created by act in law) because the originall estate was not punishable of waste.

(3) *Non faciant.*] To doe or make waste, in legall understanding in this place, includes as well permissive waste, which is waste by reason of omission, or not doing, as for want of reparation, as waste by reason of commission, as to cut downe timber trees, or prostrate houses, or the like; and the same word hath the statute of Glouc. cap. 5. *que aver fait waste*, and yet is understood as well

of

Regist. 72.

Bract. li. 4. fo.

355, 356, 357.

Fleta, lib. 5. ca.

34.

Regist. 72.

First part of the

Inst. sect. 67.

Dier 11 Eliz.

28. b.

of passive, as active waste, for he that suffereth a house to decay, which he ought to repaire, doth the waste: and therefore if a man maketh a lease for yeares by indenture of a house and lands, upon condition, that if it happen the lessee to doe any waste, that the lessor shall reenter, in this case if the lessee suffer the houses to be wasted, the lessor shall re-enter, so as this word *facere*, hath not onely this signification in a penall statute, but in a condition also.

This act prohibiteth that farmers shall not doe waste, and yet if they suffer a stranger to doe waste, they shall be charged with it, for it is presumed in law, that the farmer may withstand it, *Et qui non obstat quod ob stare potest, facere videtur*. Secondly, the law doth give to every man his proper action, so as none of them be without due remedy: and therefore in this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the losse, as reason requireth, in the end shall lie upon the wrong doer, and if the lessor should not have his action of waste, hee should bee without remedy.

(4) *Nec de aliquibus ad tenementa quæ habent ad firmam spectantibus.*] There were before particularly named *de domibus, boscis, et hominibus*; these words doe comprehend lands and meadowes belonging to the farms.

Also these generall words have a further signification, and therefore if there had been a farmer for life, or yeares of a mannor, and a tenancy had escheated, this tenancy so escheated did belong to the tenements that he held in farm, and therefore this act extended to it, and the lessor shall have generally a writ, and suppose a lease made of the lands escheated by the lessor, and maintain it by the speciall matter.

(5) *Nisi habeant specialem concessionem.*] This graunt ought to be by deed, for all waste tendeth to the dis-inheritance of the lessor, and therefore no man can claime to be punishable of waste without deed.

^a In Lewis Bowles case you may reade plentifully of this matter. This speciall graunt is intended to be *absque impetitione vasti*, without impeachment of waste. Impeachment commeth of the French word *empechement*: ^b the sages of the law have used the word *impetito*, derived of *in* and *peto*, and that *sine impetitione vasti*, is as much to say, as without impeachment, that is, without any demand or challenge for doing of waste; but if the clause be either *sine impedimento*, or *impeditione vasti*, it amounteth in judgement of law to as much as *sine impetitione vasti*.

(6) ^c *Damna plena restituant et per misericordiam graviter puniantur.*] ^d And this must be understood in such a prohibition of waste upon this statute, as lay against tenant in dower at the common law, and single damages was given by this statute against lessee for life, and lessee for yeares.

This statute of Glouc'. cap. 5. gave treble damages, and the place wasted against lessee for life, lessee for yeares, and tenant by the courtesie, &c.

But after this statute, and the statute of Glouc'. *Consuevit fieri breve de prohibitione vasti, per quod breve multi fuerunt in errore, credentes quod illi qui vastum fecerint non habuerunt necesse respondere nisi tantum de vasto facto post prohibitionem eis directam; dominus rex (ut hujusmodi*

21 H. 7. 37. 4.

[146]

First part Inst.
sect. 67.

3 E. 3. fol. 34.
24 E. 3. 37.

^a Lib. 11. fo. 82,
83. Vide lib. 4.
fo. 63 lib. 9.
fol. 9.

^b Vide l. 11. fo.
82. b.

Lewys Bowls
case. See the first
part of the Inst.
sect. 354. verb.
sans Impeachment
de Waste.
Adjudg. Tr. 6
Jac. in Com.
Banco. Lib. in-
trat. Co. 664,
665.

^c Fleta, li. 1.

ca. 11.

^d Regist. 72.

W. 2. cap. 14.

hujusmodi error de cætero tollatur) statuit quod de vasto quocunque, &c. non fiat de cætero breve de prohibitione sed breve de summonitione, quod ille, de quo queritur, respondeat de vasto facto quocunque tempore, &c.

Regist. fol. 72.

Whereupon the prohibition of waste was abrogated, and the action of waste framed upon the act of Westm. 2. as in the Register appeareth.

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C A P. XXV.

JUSTICIARII itinerantes de cætero non amercent villatas in itinere suo, pro eo quod singuli xii. annorum (1) non venerint coram vicecomitibus et coronatoribus, ad inquisitiones de roberiiis (2), incendiis domorum (3), vel aliis ad coronam spectantibus (4) faciend'. Dum tamen de villatis illis veniant sufficientes (5), per quos inquisitiones hujusmodi plene fieri possunt, exceptis inquisitionibus de morte hominis (6) faciend', ubi omnes xii. annorum, venire debent, nisi rationabilem causam habeant absentie sue.

THE justices in eyre from henceforth shall not amerce townships in their circuits, because all being twelve years old came not afore the sheriffs and coroners, to make inquiry of robberies, burnings of houses, or other things pertaining to the crown; so that there come sufficient out of those towns, by whom such enquests may be made full: except enquests for the death of man, whereat all being twelve years of age, ought to appear, unless they have reasonable cause of absence.

Magna Chart. ca. 35. Hic. ca. 10. & 8. (Fitz. Wast. 11. 39. 53. 66. 72. 73. 101. 103. 120.)

Two mischiefs were before the making of this statute.

First, that if the sheriffe did present before the justices in eyre, that those of the age of twelve yeares came not to the tourn, that the townships where they dwelt should be amerced, for that every one above twelve years appeared not at their tourns, where they should be sworne, (as hath been said) amongst other things, that they should doe no felony, nor assent to any, and therefore albeit they could not be present *ad inquisit' faciend'*, being under age of 21, yet they ought to be there to take the oath, and to discover felonies, if any they knew, according to their oath.

Another mischiese, that when any robbery, burning of houses, homicide, or other felony was done, the sheriffe, for so much as pertained to him, or the coroner in case of the death of man, would summon many townships, and sometime a whole hundred, where twelve would serve to make enquiry: and if all did not appear according to the summons, they would present the same before the justices in eyre, where the whole townships or hundred were amerced, albeit many times a sufficient number to make enquiry did appeare. Now this statute provideth remedy, that when there commeth out of the townships so summoned, a sufficient number by whom inquisitions may be fully made, that no amerciements shall be set upon the townships or hundred by the justices in eyre, which was one remedy for both the two mischiefs.

(1) *Singuli*

(1) *Singulii xii. annorum.*] Where old bookes mention sometime 14 years, it is but misprinted; for the time for one to come to the tourn or leet, and to take his oath, as is afore said, is twelve yeares, and so it is provided by this act.

(2) *De roberiiis.*] See for this word in the first part of the Institutes, sect. 501.

(3) *Inceudiis domorum.*] By this it appeareth, that burning of houses was felony by the common law, for otherwise he could not have enquired of the same in his tourn.

This is to be understood not onely of a dwelling house, but of the barne or stable belonging thereunto.

The Mirror goeth further, for he reckoning the same amongst the highest offences, saith, *ardours sont que ardent city, ville, maison, best, ou autres chateaux de lour felony in temps de peace pur haine, ou vengeance.*

Les appeales de arsons se font in tiel manner, cedde icy appeal Harding illonque (orve les furnosmes) de ceo q. come mesne cesti cedde arvoit un maison ou plusors, ou un tasse de blee, ou un mollein de seyne, ou auter manner de biens in tiel lieu, &c. la vient mesme celuy Harding, et en le dit meason mist fevre, &c. feloniousment, &c.

And Fleta saith, *Si quis ædes alienas nequiter ob inimicitiam vel prædæ causa tempore pacis combusserit, et inde convictus fuerit per appellum vel sine, capitali debet sententia puniri.* But this belongeth to another treatise.

(4) *Vel aliis ad coronam spectantibus.*] Here is meant other felonies at the common law, which are called *placita coronæ*, either enquirable before the sheriffe in his tourne, or the coroner, of whom the statute here speaketh.

(5) *Dum tamen de villatis illis veniunt sufficientes.*] But if there appeare not sufficient, as if there appeare under 12, then all that were summoned shall be amerced, and this doth follow the reason of the common law, for where for triall of any issue, there shall be summoned 24, if there 12 onely appeare, and are sworne, the others that made default shall not be amerced; but if any of them that doe appeare be challenged and tried out, so that 12 remain not to try the issue, then all the rest shall be amerced, as if there had under 12 originally appeared: and it is a good exposition of a statute, when the reason of the common law is pursued: see before cap. 18. concerning amerciaments.

(6) *Exceptis inquisitionibus de morte hominis, &c.*] The law hath so great respect to the punishment of homicide or murder, that at that inquisition before the coroner, all above 12 must appeare (to the end the truth may be found out and punished, and the horrible crime of murder detected) unlesse they have a reasonable excuse to the contrary.

Mag. Chart.
c. 35.

Vide W. 1. c.
15.

Bract. 1. 2. fol.
Brit. fol. 16.

Fleta, lib. 2. ca.
35.

Stamf. Pl. Cor.
fol. 36. a.

11 H. 7. 1.

Mirror, c. 1. § 8.
de Ardours et

§ 13.

Cap. 2. § 11. de
Appeal de Arson

& cap. 1. § 13.

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Fleta ubi supra.

Britton, ca. 6.

C A P. XXVI.

MURDRUM (1) *de cætero non adjudicetur coram justiciariis, ubi infortunium tantummodo adjudicatum est, sed locum habeat murdrum de interfectis per feloniam* (2) *tantum, et non aliter.*

MURTHUR from henceforth shall not be judged before our justices, where it is found misfortune only, but it shall take place in such as are slain by felony, and not otherwise.

Bracton, lib. 1. fol. 120, 121. Britton, cap. 6. Fleta, lib. 1. cap. 23. (Keyling, 123. Co. Ent. 354. 2 Roll, 120.)

Britton, cap. 7.
3 E. 3.
Coron. 354.
3 E. 3. ibid. 322.

21 E. 3. 17. b.

Numb. 35. 9.
Deut. 29. 2.
Joshua 29, 21.
&c.

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See the statute
of Glouc' c. 9.
2 H. 4. 18.
11 H. 7. 23.
3 E. 3. coron.
302.

The mischief before this statute was, that he that killed a man by misadventure, *per infortunium*, as by doing any act that was not against law, and yet against his intent the death of a man ensued, this was adjudged murder: as if a man had cast a stone over an house, or shot at a mark, and by the fall of the stone, or glauce of the arrow a man was slain, the party should suffer death. And so it was at the common law, if a man had killed a man *se defendendo*, he should be hanged, and forfeit in both cases, as in case of murder; so tender a regard had the law to the preservation of the life of man. And with the common law was agreeable the judicall law, before the cities of refuge were appointed; he that killed a man by misadventure, &c. was put to death, to the end that men should be so provident and wary of their actions, as no death of man, woman or child might ensue thereupon.

This statute doth remedy both points, for the latter clause is generall, that it shall not be murder, but where it is done *per feloniam*, i. *felleo animo*, and by malice prepenfed. And albeit his life in neither of these cases is now lost, yet the forfeiture of his goods and chateux remained in both cases. And so if a man kill a man by misadventure, if he escape, the towne shall be amerced, &c. is also a mark of the common law.

(1) *Murdrum.*] For this word, see the 1 part of the Instit. sect. 500. To speak of the parts of homicide, doth belong to another treatise; this onely shall suffice for the understanding of this act.

See the first part
of the Instit. sect.
745.

(2) *Per feloniam.*] For this word, and the signification thereof, see the first part of the Institutes at large.

C A P. XXVII.

PROVISUM est, quod nullus qui coram justiciariis itinerantibus vocatur ad warrantum in placito terræ, vel tenement', amercietur de cætero, pro eo quod præsens non fuerit quando vocatur ad warrantum (excepto primo die

IT is provided, that none, being vouched to warranty before our justices in eyre, in plea of land or tenement, shall be amerced from henceforth, because he was not present when he was vouched to warranty, except the

die adventus justiciar' ipforum) sed si warrantus ille fuerit infra comitatum, tunc injungatur vicecom', quod ipsum infra tertium diem, vel quartum (secundum locorum distantiam) faciat venire, sicut in itinere justiciar' fieri consuevit. Et si extra comitat' maneat tunc rationabilem habeat summonitionem xv. dierum ad minus, secundum discretionem justiciar' et legem communem.

the first day of the coming of the justices: but if the party vouched be within the shire, then the sheriff shall be commanded to cause him to come within the third or fourth day, according to the distance of the place, as it was wont to be done in the circuit of the justices. And if he dwell without the shire, then he shall have reasonable summons of fifteen days at the least, after the discretion of the justices, and the common law.

Bract. l. 3. fo. 115, 116. Brit. c. 2. fo. 7. Fleta, li. 1. cap. 9. Mirror, cap. 4. cap. Itineris

By the common law, all the men of the county ought to appear before the justices in eire *per breve de generali summonitione vic' direct'*, quod *præmoneat omnes de com' quod sint coram talibus justiciariis ad certum diem et locum per quadraginta dies*, as well that every man should be ready to answer to any matter, wherewith he was to be charged, or commenced against them, as to serve the king and his country, as need should require, and to heare and learne the lawes and customes of the realme, under which they lived. Now the mischief was, that if the * vouchee appeared not at the first day, he was amerced, for that he ought to be present. Now this statute enacteth, that he shall not be amerced at the first day, but proces shall be awarded against him, as by this act is limited; and if he come not then, he shall be amerced: wherein it is to be observed how the common law provideth for expedition of justice, and how necessary it is for understanding of old statutes, to reade old bookes.

* For this word Voucher, see the first part of the Inst. § 145. verily. Et il vouches, &c. Customier de Norm. cap. 50. fo. 64. b.

C A P. XXVIII.

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SI clericus aliquis (2) *pro crimine aliquo, vel recto, quod ad coronam pertineat* (3), *arrestatus fuerit, et postmodum per præceptum domini regis in ballium traditus fuerit vel replegiatus extiterit* (1), *ita quod hii, quibus traditus fuerit in ballium, eum habeant coram justiciariis, non amercentur de cætero illi quibus traditus fuerit in ballium, nec alii pleg' sui, si corpus suum habeant coram justiciariis, licet coram eis propter privilegium clericale respondere noluerit, vel non potuerit propter ordinarios suos.*

IF a clerk, for any crime or offence touching the crown, be arrested, and after, by the king's commandment, let to bail, or replevied, so that they, to whom he was let to bail, have him before our justices; the sureties from henceforth, nor they to whom he was let to bail, shall not be amerced (if they have his body before our justices) although he will not answer before them, by reason of a clerk's privilege, nor cannot by reason of his ordinary.

(Bro. Coron. 111. 28 H. 3. c. 1. 32 H. 3. c. 3.)

(1) *In*

Vide W. r. c. 15.
Stam. pl. cor. 72.
Regist. 77.

(1) *In ballium traditus fuerit, vel replegiatus extiterit.*] Here note a difference between baile, and replevie; for the one is by the higher courts at Westminster, and the other, viz. replevie, by the sherriffe, by force of the writ of *homine replegiando*.

For the understanding of this act, it is to be knowne, that at the common law when any man was appealed or indicted of felony, if he were bayled, the bayle was, that he should appeare at a certaine day before such justices to answer to the felony. Now the mischief was, that if a man were bailed, or delivered by plevin, albeit he did appeare, yet if he claimed the benefit of his clergie, the persons that bailed him, or his pledges were amerced, because he refused to answer to the felony; but tooke himselfe to his clergie; this statute doth provide, that if in that case the clerk doth appeare before the kings justices, his baile or pledges shall not be amerced, although he will not answer before them by reason of his clerks priviledge.

(2) *Si clericus aliquis.*] If he were no clerk at the time of the baile, or deliverie by plevin, but learned to reade before his appearance, yet he was within this statute, and yet a clerk was not bailed nor delivered by plevin.

(3) *De aliquo crimine vel recto quod ad coronam pertineat.*] ^a Where it is printed *rectum*, it must be amended after the originall, and made *retum*: this is derived of an old word *rette*; or *reatte*, à *reatu*, and signifieth in our legall understanding an offence or fault.

^a W. 2. cap. 2.
Regist. in homine replegiand.
F. N. B. fo. 66.
^b Al. Powlters case, li. 11. 29, 30. Art. cler. cap. 14. Mich. 31 E. 3. coram rege r. 1. 138. in Thesau. Abbas de Miffenden. 17 E. 2. rot. Rom. m. 6. Adam Evefq; de Heref. 20 E. 2. coro. 283. 19 H. 6. 47. 25 E. 3. c. 4. 5. 18 E. 3. c. 1. Vide Powlters case ubi sup.

^b *Crimen* and *retum* are here taken for such offences wherefore a man should lose life or member, because for no other offence he can have his clergie, or the priviledge of a clerk. But in *crimine læsæ majestatis* he was not to have his clergie, and therefore this act extendeth not to persons let to baile for high treason, and so it is in case of sacriledge, and the like.

And thus is this dark statute clearly expounded.

^c Now to set down in what cases one shall be bailed, or delivered by plevin, and where a man shall have the benefit of his clergie, and where he is barred thereof by act of parliament, doe belong to another treatise: in the meane time somewhat you shall reade of clergie in Alex. Powlters case, *ubi supra*, and lib. 4. fo. 44. 45. 46.

^c Mirror, c. 3. de except. de Clergy. Bract. li. 3. 123, 124. Flet. l. 1. c. 28. Brit. ca. 4. fo. 11. lib. 6. cap. 36.

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C A P. XXIX.

PROVISUM est, quod si deprædationes, vel rapinæ aliquæ fiant abbatibus, prioribus, vel aliis prælatis ecclesiasticis (1), et ipsi jus suum de hujusmodi deprædationibus prosequentes morte præveniantur (2), antequam judicium inde fuerint assequuti, successores eorum habeant actiones ad bona (4) ecclesiæ suæ

IT is provided, that if any wrongs or trespasses be done to abbots, or other prelates of the church, and they have sued their right for such wrongs, and be prevented with death before judgement given therein; their successors shall have actions to demand the goods of their church out of the hands

suæ (5) de manibus hujusmodi transgressoris repetend' (3). Similem insuper habeant actionem successores de hiis quæ domui suæ et ecclesiæ [recenter] ante obitum (6) prædecessorum suorum per hujusmodi violentiam fuerint subtrahæta, licet prædicti prædecessores sui jus suum prosecuti non fuerint in vita sua. Si autem in terris et tenementis hujusmodi religiosorum, de quibus eorum prælati obierint seiscit', ut de jure ecclesiæ suæ, aliqui se intrudant tempore vacationis, successores sui breve habeant de seiscina recuperand', et adjudicetur eis dampna sua (7), sicut in nova disseisina adjudicari consuevit.

hands of such trespassers. Moreover, the successors shall have like action for such things as were lately withdrawn by such violence from their house and church, before the death of their predecessors, though their said predecessors did not pursue their right during their lives. And if any intrude into the lands or tenements of such religious persons in the time of vacation, of which lands their predecessors died seised as in the right of their church, the successors shall have a writ to recover their seisin. And damages shall be awarded them, as in assise of novel disseisin is wont to be.

(Fitz. Trespass, 205. 211. 237. 242. Fitz. Brief, 176. 296. 359. 623. 828. 2 H. 4. 4. Regist. 72. 125. F. N. B. 112.)

There were two mischiefs at the common law (as many did hold) that in the case of abbots, priors, and other regular and religious persons, if the goods of the monastery were taken away in the life of the predecessor, that after his death his successor had no remedy for such trespasses: the other mischief was, that if in time of vacation, when there was no abbot, or prior, or other regular or religious sovereign, any intrusion were made, the successor had no remedy to recover the land with damages, though thereof his predecessor died seised, and both these are remedied by this act.

(1) *Abbatibus, prioribus, vel aliis prælatiis ecclesiasticis.*] This act extendeth onely to abbots, priors, and other prelates that be religious and regular, and not to bishops and other persons ecclesiasticall being secular: for in the second clause of this act, *hujusmodi religiosorum* is mentioned for the distinction between religious and secular. See the first part of the Institutes, sect. 133. And the reason of this diversitie is, that the abbots, priors, and other religious and regular persons are dead persons in law, and have capacity to have lands and goods onely for the use and benefit of the house; and cannot make any testament; and therefore the church or religious house is holden alwayes one, in respect whereof the succeeding abbot shall have an assise for a disseisin done in the life of the predecessor, and an action of waste for waste done in his predecessors time; but so shall not a bishop, archdeacon, dean, parson, or the like, that are ecclesiasticall secular, because the church by their death hath an alteration, and is not alwayes one, and they may make their testament, for that they may have goods and chattels to their own use.

Also the bishop is of an higher degree then the abbots and priors with which this act begins.

(2) *Morte præveniant.*] So it is if an abbot or prior be deposed, the successor shall have an action upon this act, although the predecessor be alive, as well as if he had died, for as to that house he is civiliter mortuus.

42 E. 3. 22.
2 H. 4. 2. 3. 19.
21 H. 6. 46.
4 E. 4. 8.
9 E. 4. 33.
18 E. 4. 16.
1 E. 5. 4. 5.
li. 2. fo. 46.
Hic c. 19. W. 1.
c. 3. 15. 26.

Temps E. 1.
trns. 242.

(3) *Successores*

(3) *Successores habeant actionem ad bona ecclesiæ suæ de manibus hujusmodi transgressoris repetend'.*] Some have thought in respect of this word *repetenda*, that this must be intended of an action of detinue, or the like action, wherein the thing it selfe is to be recovered, but *de manibus hujusmodi transgressoris* make it evident, that it must be intended of a trespassse *quare vi et armis*, for thereof was the doubt at the common law: for it is holden, that for goods taken from the predeceffour of an abbot or prior, no action was given to the successor at the common law before this act, for by the taking the property was divested. But an action of account, debt, detinue, replevin, and the like action, which affirms the property to continue; the successor shall have an action at the common law.

(4) *Bona.*] 1. If an obligation be taken from the predeceffour, it is within this statute. 2. The successor shall have by the equitie of this statute an action of trespassse of cutting downe of trees, and carrying them away: wherein it is to be observed, that acts that give remedy for wrongs done, shall be taken by equitie.

(5) *Ecclesiæ suæ.*] The action that the successor shall bring upon this statute, shall be *bona et catalla domus et ecclesiæ suæ tempore I. predecefforis sui*, which without question a bishop, deane, or other ecclesiasticall secular cannot say.

(6) *Recente ante obitum.*] Yet if the taking of the goods were long before the death of the abbot or prior, his successor shall have an action of trespassse by this statute.

(7) *Si autem in terris et tenementis hujusmodi religiosorum, &c. aliqui se intrudant tempore vacationis, &c. breve habeant de seifina sua, et adjudicentur eis damna.*] This branch is also taken by equitie, for by these words, the successor of an abbot, prior, or any other religious soveraigne shall have an action of trespassse for trees cut downe and carryed away in the time of vacation.

But a bishop shall not have an action of trespassse in that case, 1. as hath been said, for that this act extends not to him; 2. the king hath the temporalities during the vacation, and therefore he cannot have an action of trespas: but in the Register there is in that case an oier and terminer to be granted to heare the trespassses done in time of vacation of the bishoprick, as thereby appeareth, which seemeth in favour of the church to be granted by the common law, for it is not grounded upon this act, and therefore I leave the marginall notes in the Register that are newly added, and are not warranted by ancient manuscripts, to the judicious reader.

And the writ of intrusion lieth not for the successor of the bishop, for an intrusion in time of vacation for the kings possession (which he hath without office) preserveth the inheritance of the bishop, but it lyeth by this statute, where one intrudes after the decease of an abbot or prior. Vide the first part of the Institutes sect. 443, for this manner of intrusion, while the freehold and inheritance is in consideration of law.

12 H. 4. tit.
Account 124.
4 E. 3. 11. 17.
25 E. 3. 45.
9 H. 6. 25.
17 E. 3. tit.
Execut 106.
11 E. 3. Account
57. 47 E. 3. 23.
3 E. 3. 31.
4 E. 4. 8.
18 E. 4. 16.
7 H. 4. 5.
11 H. 4. 55.
femle.
7 E. 4. 15. a.
9 E. 4. 33.
9 H. 6. 25. 26.
Regist. 96.
16 E. 3. trns 211.

18 E. 2. trns 237.
2 H. 4. ubi sup.
18 E. 4. 16.
F.N.B. 89. i.

Regist. 125.
F.N.B. 112 h.
& 113.

4 E. 4. 8.

C A P. XXX.

PROVISUM est etiam, quod si alienationes (1) illæ, de quibus breve de ingressu (2) dari consuevit, per tot gradus fiant (3), per quot breve illud in forma prius usitata fieri non possit, habeant conquerentes breve ad recuperandum seisinam suam, sine mentione graduum (4), ad cuiuscunque manus per huiusmodi alienationes res illa devenerit (5), per breve originale, et per commune consilium domini regis inde providendum (6), &c.

IT is provided also, that if those alienations (whereupon a writ of entry was wont to be granted) hap to be made in so many degrees, that by reason thereof the same writ cannot be made in the form beforetimes used, the plaintiffs shall have a writ to recover their seisin, without making mention of the degrees, into whose hands soever the same thing shall happen to come by such alienations, and that by an original writ to be provided therefore by the council of our lord the king.

Bracl. l. 4. fo. 318. &c. Brit. ca. 114. Fleta, lib. 1. ca. 11. lib. 4. cap. 1. Pasch. 18 E. 1. in Banco Rot. 4. Eborum, John de Hodeletons case. (Fitz. Cui in vita 23. Fitz. Entre, 9. 11. 49. 56. Fitz. Brief, 438. 469. 693. 812. 1 Inst. 238. b. 239. a. Regist. 228. F. N. B. 191. D. K. 192. 201. 203. Raft. 283.)

It is to be observed, that the common law provided for the quietness of mens freehold and inheritance, and that they should not be disturbed from manurance of their grounds; in so much as he that right had could not enter upon him that came in by descent or lawfull conveyance, but was driven to his writ of entry; and the common law for the safety of mens possessions further provided, that if the land were conveyed out of the degrees, so as the demandant could not have his writ of entry in *le per*, or in the *per et cui*, the demandant (to the end that suits might have an end) was driven to his writ of right, a long and small remedy, and that he which right had should take his remedy by writ of entry before there were above two descents, or two conveyances, and also within the time of prescription.

This statute in cases of descents and conveyances, after the degrees past, doth give a writ of entry in the *post*, which in those cases lay not at the common law. But in other cases, then in case of alienation and descent, there was a writ of entry in the *post* at the common law: as where one entred by disseisin, intrusion, abatement, judgement, succession, or as tenant by the curtesie, in these cases a writ of entry in the *post* did lie at the common law, but if the wife recover her dower by judgement, yet is she in the [*per*] by her husband, and if the second alience be disseised, and he recover in a reall action, yet lieth the writ against him in the *per et cui*, because the alienation to him is the ground of his title, *et sic de cæteris*.

(1) *Si alienationes, &c.*] Hereby it appeareth that this act extendeth where the lands were aliened from one to another, either by lawfull conveyance, or by descent; and by construction this act extendeth as well to alienations, &c. made before the statute as

II. INST.

N

after,

See the 1. part of the Institutes, sect. 473.

14 H. 4. 39, 42.

F. N. B. 192. f. Fleta, lib. 5. c. 34.

5 E. 2. Cui in vita 23. 7 E. 3. 12.

19 H. 6. 17.
21 H. 6. 8.
9 E. 4. 16.
1 H. 6. 1.

after, for statutes, that give remedy to them that right have, are ever favourably expounded; observe well the words of this act: if the disseisee doth release to the disseisor, this doth amount to an alienation, and maketh a degree, but a surrender of an estate for life maketh no degree, yet is it an alienation.

(2) *Breve de ingressu.*] This is understood of writs of entry, *sur disseisin in le post, in le quibus, sine assensu capiti, cui in vita, sur cui in vita, non compos mentis, dum fuit infra ætatem, ad term' qui præterit, in casu proviso, in consimili casu ad communem legem*, of intrusion, *causa matrimonii prælocuti*.

(3) *Per tot gradus fiant.*] *Gradus dicitur à gradiendo*, because the state passeth by degrees from one to another, and in the law it signifieth, a conveyance, or a descent from one to another, and there be but two degrees, viz. in the *per*, and in the *per et cui*, if it proceed any further either by conveyance, or descent, it is out of the degrees: if a gift in taile, or a lease for life be made the remainder over, the first estate, and all the remainder make but one degree.

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50 E. 3. 21.

* 15 H. 3. brē.
878. 20 H. 3.
Aff. 432. 19 E. 2.
Aff. 450. 4 E. 2.
brē. 790. 8 E. 3.
63. 8 Aff. 28.
7 E. 3. 69. 50 E.
3. 22. 43 Aff.
14. 3 E. 4. 17.
10 E. 4. 18 W.
2. cap. 25.
Bract. fo. 318.
323. 324. 326.
Brit. cap. 11.
Fleta, li. 1. c. 11.
lib. 4. cap. 1.
a W. 1. c. 40.
7 E. 3. 25.
11 E. 3. brē. 472.
22 E. 3. 1. b.
5 E. 3. 216.
24 E. 3. 70. 39
E. 3. 25. 14 H.
4. 39. 27 H. 6.
ent. 23. F.N.B.
192.
b 31 E. 1. brē.
875. 39 E. 3. 33.
44 E. 3. 45.
9 E. 4. 47.
5 H. 7. 6.
21 H. 6. 8. Br.
tit. Entry 19
c 5 E. 3. 31.
3 H. 6. 38.
7 H. 4. 17.
7 E. 3. 53.

* And these alienations that make degrees ought (as hath been said) to be so lawfull, as the aliensee may be in by title; and therefore a feoffment by a garden in chivalry, socage, or by nurtur, a termor for yeares, tenant at will, or bayliffe, or tenant in villenage doe make no degree, because they amount to a disseisin, and some hold the feoffee was a disseisor at the common law; and where the words of the statute be *quod alienationes*, those must be intended lawfull alienations, such as by the auncient law should have taken away an entry.

* Regularly a man should not have a writ of entry in the *post*, where he may have a writ within the degrees, and the cause thereof is to ouste false vouchers, yet in some cases a man may have election either to have a writ of entry in the *post*, or a writ of entry in the *per et cui*; ^b as if I may have a writ of entry in the *per et cui* against B. who aliens, so as now it is out of the degrees, yet if B. take back an estate again, I may choose either a writ of entry in the *per et cui* or in the *post*, but *prima facie*, the writ of entry in the *per et cui* is more beneficiall, because the tenant in the writ of entry in the *post* may vouch at large, and so he cannot doe in the other writ, but onely within the degrees.

* But if the tenant take back an estate to him, and to another, then I am driven to my writ of entry in the *post*, so it is if the state be made to the heire of B.

A woman seised of a rent taketh husband, the husband purchaceth the land where out, &c. and after alieneth the land in fee, by which he includedly passeth the rent and dieth, the wife in a *cui in vita*, shall suppose the aliensee to be in the *per* or *post*. And yet in some case one shall have a writ of entry in the *post*, when the degrees be not past, (note well the words of this act.)

If a disseisor hath issue two daughters, and the one daughter hath issue and dieth, in this case the aunt is in the *per*, and the niece is in the *per et cui*, and one writ must be brought against them both, which must be in the *post*, because one writ cannot be brought both in the *per* as to one, and in the *per et cui* as to the other.

Howbeit

Howbeit in some cases a writ of entry in the *per* shall lie, although there be many alienations or disseisins; as if the husband be seised in fee and die, and twenty alienations or disseisins be made, now doth the writ of entry in the *post* lie but if the wife be endowed, the entry of the wife shall be supposed by her husband; but otherwise it is of the tenant by the courtesie, for the law worketh by issue had without any assignement, and therefore meere in the *post*.

30 E. 1. br. 884.
4 E. 3. fo.
24 B. 3. 32.
36 H. 6. Dower
30. Vide first
part of the Inst.
sect. 393.

(4) *Sine mentione graduum.*] This is intended a writ of entry in the *post*, so called of this word used in the writ, *in quod idem A. non habet ingressum nisi post disseisinam quam C. injuste, &c. fecit prædicti B.*, &c.

As the writ of entry, which writ is *sine mentione graduum*, as our act speaketh: as the writ of entry in the *per*, is so called of this word [*per*] in the writ, *in quod idem A. non habet ingressum nisi per C. qui illud ei dimisit*: and in the *per et cui*, of those words in the writ, *in quod idem A. non habet ingressum nisi per C. cui D. illud dimisit, qui inde injuste, et sine judicio disseisivit*, &c.

But for as much as the law is never knowne untill the reason thereof be apprehended; wherefore should not the successors of a bishop, deane, abbot, prior, &c. be as well in the *per*, as the heire by descent? And the reason thereof is, for that the heire commeth in by his auncestor, and therefore a descent shall take away an entry, and the warranty of the auncestor shall barre the heir, but in case of succession, a dying seised taketh not away an entry, nor the warranty of the predecessour doth binde the successor; and therefore the Register delivereth it for a rule, with the reason thereof, *breve de ingressu debet impetrari versus successorem semper in le post, quia successor per prædecessorem non ingreditur*. And herewith agreeth Bracton who saith, *item quæritur, &c. an faciunt gradum de abbate in abbatem, sicut de hærede in hæredem; et videtur quod non, magis quam in computatione descensus, quia etsi alternatur persona, non propter hoc alternatur dignitas, sed semper manet*.

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Regist. 230:
See the first
part of the In-
stitutes, § 386.
534.
5 Ed. 3. 13.

(5) *Res illa devenerit.*] This is intended of lands, tenements, rents, and other things whereof a præcipe doth lie.

(6) *Per consilium domini regis inde providendum.*] Which was done accordingly, and the writ set downe in the Register.

Regist. 130.

STATUTUM DE WESTMINSTER PRIMER.

Editum anno 3 Edw. I.

CEUX sont les establishments (1) le roy Edward fits le roy H. faits a Westminst. a son primer parlement general (2) apres son coronement (3), lendemain de la cluse de Pasche (4), lan de son raigne 3. (5), per son counsell (6), et per lassentments des archeviesques, evesques, abbes, priors, countes, barons, et tout le comminalty de la terre il lonques summones (7): pur ceo que nostre seignior le roy ad graund volunt et desire del estate de son realme redresser en les choses ou mestier est damendment, et ceo pur le common profit de saint esglise, et de son realme, et pur ceo que lestate de son realme, et de saint esglise ad este malement garde, et les prelates et religious de la terre en mults des manners grievous, et le people auterment treit que estre duist, et la peace meins garde, et les leyes meins uses, et les misfesants meins punies, que estre duissent, per quoy les gentz de la terra doubteront meins a misfaire: cy ad le roy ordeine et estable les choses southscripts, les queux il entende desre profitables et covenantes a tout le realme.

THESE be the acts of king Edward, son to king Henry, made at Westminster at his first parliament general after his coronation, on the Monday of Easter Utas, the third year of his reign, by his council, and by the assent of archbishops, bishops, abbots, priors, earls, barons, and all the commonalty of the realm being thither summoned, because our lord the king had great zeal and desire to redress the state of the realm in such things as required amendment, for the common profit of holy church, and of the realm: and because the state of the holy church had been evil kept, and the prelates and religious persons of the land grieved many ways, and the people otherwise intreated than they ought to be, and the peace less kept, and the laws less used, and the offenders less punished than they ought to be, by reason whereof the people of the land feared the less to offend; the king hath ordained and established these acts under-written, which he intendeth to be necessary and profitable unto the whole realm.

The preface of
the statute of
W. 1.

§ E. 3. 14.

(1) *Ceux sont les establishments.*] *Stabilimina*, or *stabilimenta*, establishments, or assurances comming of *stabilis*, and that againe à *stando*, of standing; and justly may not onely these chapters challenge that name, but all other the statutes made in the raigne of this king may be stiled by the name of establishments, because they are more constant, standing, and durable laws, then have been made ever since: so as king E. 1. who (as sir William Herle chiefe justice of the court of common pleas, that lived in his time, said, *Fuit le plus sage roy que unquet fuit*) may well bee called our Justinian.

(2) *A son parlement general.*] So called, because all the laws then

then made were generall, and that great and honourable assembly were not entangled with private matters, but with such onely, as were for the generall good of the common-wealth, for the end of this parliament, is, as hereafter in the preface is expressed, *pour le common profit de saint esglise, & del realme.*

(3) *Après son coronement.*] He began his raigne the 16 day of November, *anno Dom.* 1272. he then being in the land of Palestine; and after his returne into England, was crowned the 19 day of August, in the 2 yeare of his raigne (and not the 9 day of December, in the 1 yeare of his raigne, as some have mistaken) as evidently appeareth by this preface, and by ancient records hereafter remembered.

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Vet. Mag. Chart.
fo. 144.

(4) *Lendemain de la cluse de Pasche.*] That is, in *crastino clausi Pasche*, or in *crastino octabis Pasche*, which is all one: in English, the morrow of the utas of Easter. It is called *utas* of *buit*, which signifieth eighth, *viz.* the eighth day after, including Easter day it selfe for one.

Glanv. li. i. c. 6.

Note, this parliament was summoned to be holden at London in *quindena* of the purification after his coronation, and prorogued from thence untill the morrow after the utas of Easter to be holden at Westminster. And the number of eight was much respected in the ancient lawes, as amongst the lawes of king Edward the Confessor, *Pax regis die qua coronatus est, quæ dies tenet octo, in die natali domini dies octo, in Paschate dies octo, in Pentecoste dies octo, &c.* Now the eighth day, accounting the feast day for one, is *clausum festi*, that is, the closing up of the feast for many purposes.

(5) *L'an de son raigne 3.*] This proveth that he was crowned in *anno* 2. for if he had been crowned in *anno* 1. of his raigne, then this parliament should have been holden in the 2 yeare: and this is proved by other matter of record. But the truth is, that the 19 day of December, in *anno* 1. of his raigne, he was not returned into England.

Vide vet. Mag.
Char. 1 part, fo.
144. b.

Rex venerabili in Christo patri, Roberto Cant' archiepiscopo, totius Angliæ primati, salutem. Quia generale parliamentum nostrum, quod cum prælati et magnatibus regni proposuimus habere London' ad quindenam purificationis beate Mariæ proxim' futur', quibusdam certis de causis prorogavimus usque in crastinum clausi Pasche proxim' sequen'; vobis mandamus rogantes quatenus eidem parlamento ibidem in eodem crastino clausi Pasche interfisitis ad tractandum et ordinandum una cum prælati et magnatibus regni nostri de negotiis ejusdem regni, et hoc nullatenus omittatis. Teste rege apud Woodstock, 27 die Decembris.

Dorf. claus. an.
3 E. 1. m. 21.

Rex in primo generali parlamento suo post coronationem suam in crastino octabis Pasche, anno regni sui 3. de voluntate sua, et consiliariorum suorum consilio, et communitatis regni sui ibidem convocat' consensu, ad honorem Dei, &c. ordinavit et statuit quod, &c.

Rot. pat. an. 4.
E. 1. m. 9. 14.

Rex Edw. tenuit primum generale parliamentum suum post coronationem suam in crastino octabis Pasche, anno 3. regni sui.

Rot. pat. an. 10
E. 1.

(6) *Per son counsell.*] This proveth that this king and other kings before him had a privie counsell, which appeareth by the writs of parliament, that parliaments are ever summoned to be holden *de advisamento consilii nostri*. Of this see more in this first chapter.

(7) *Per lassentments des archevesques, evesques, abbes, priors, countes, et barons, et tout la comminaltie de la terre illoiq; summones.*] Here is a compleat parliament for the making or enacting of lawes,

See the 4. part
of the Infit.
cap. of the high
court of parlia-
ment.

11 H. 7. 27.

* [158]

lawes, the king, the lords spirituall and temporall, and the commons: for if an act be made by the king, and the lords spirituall and temporall, or by the king and the commons, this bindeth not, for it is no act of parliament; for the parliament concerning making or enacting of lawes consisteth of the king, the lords spirituall and temporall, and the commons; and it is no act of parliament, unlesse it be made by the king, the * lords and commons. And where it is said, by all the commonalty, all the commons of the realme are represented in parliament by the knights, citizens, and burgeses.

The purpose of this parliament is to redresse the state of the church and of the realme in those things that need amendment. The end is twofold, *Pur le common profit de saint esglise, & de son realme.*

There were five things that needed amendment.

1. For that the state of the realme and of holy church (which are ever like Hipocrates twins) had been ill governed.

2. That the prelates and other men of the church many wayes had been grieved, and the people otherwise entreated then they ought to have been.

3. The peace had not been well kept, which was against a maine maxime of law, *Inprimis interest reipublicæ, ut pax in regno conservetur, et quæcunq; paci adversentur, providè declinentur*: which maxime hath been repeated and affirmed by authority of parliament.

3 E. 6 cap. 12.

1 Mar. cap. 12.

4. That the lawes had not been put in execution against another principle of the common law, *Nihil infra regnum subditos magis conservat in tranquillitate et concordia, quam debita legum administratio.* Affirmed also in parliament.

32 H. 8. cap. 9.

5. Offendors seldome punished, *Et impunitas continuum affectum tribuit delinquendi*; for this statute saith, By reason whereof the people of the land feare lesse to offend.

The remedy hath two excellent qualities, which ought to be inseparable to every act of parliament, *viz.* to be profitable, and convenient.

Here shall you see the effects of the writs of parliament, as they be at this day: First, the writ is, *Nos de advisamento concilii nostri*; and this act saith, *Le roy per son counsel.*

2. The writ is, *Pro quibusdam arduis et urgentibus negotiis nos, statum et defensionem regni nostri Angliæ concernentibus*: and it is expressed in this act, *Que nostre seignieur le roy ad graunt volunt, et desire del estate de son realme redresser, en les chesies ou mestier est damendement, & ceo pur le common profit de saint esglise & de son realme, & pur ceo que lestate de son realme & de saint esglise ad estre malement gard, &c.*

And here it is to be observed, that this noble and wise king E. 1. was contented in a free and generall parliament to heare of the misgovernment of the state of the realme and of the church, and never sought to cover those irregular proceedings, either in his fathers time, or his owne; and thought it should be greater honour for him to rip up these grievous ulcers both in the church and common-wealth, and to cure them by wholsome rules and lawes, then to cover them, lest it should be vainly feared they should reflect upon his fathers, or his owne misgovernment, where in truth all the fault should rest upon great counsellors, and officers, and

ministers

Rot. Parl. 50 E.

3. nu. 10. 15,

16, 17, 18, &c.

Rot. Parl. 5 H 4.

10. 8. 7 H. 4.

11. 30. 41. 9 H 4.

indemnité des

Seigniors, &c.

1 H. 5. nu. 8. &c.

ministers of justice, and other the kings officers and ministers; and so it hath falne out in divers other kings times. This preamble to all the statutes is worthy of due and deliberate consideration.

Of this worthy king we have spoken in other places; this we will adde out of an approved author, *Nemo in consiliis illo argutior, in eloquio torrentior, in periculis securior, in prosperis cautior, in adversis constantior.*

Now this parliament holden at Westminster, is called Westminster the first for excellencie.

CAP. I.

[159]

EN primes voit le roy et commande, que la peuce de saint esglise, et de la terre, soit bien garde et mainteign' en tous points, et que commun droiture soit fait a tous, auxy bien as povers, come as riches, sans regard de nulluy (1). Et pur ceo que les abbies, et les measons de religion de la terre, ont este surcharges et greves malement, per le venue des graundes gents et dauters, que lour biens ne suffisont a eux mesmes, per que les religious sont ci abates et impoveres, que ilz ne poient eux mesmes susteign', ne la charge de charitie qu'ils soient faire. Purview est que nul ne veigne manger, herberger, ne giser a meason de religion (2) dauter avocuseon, que de la laine, al costages de la meason, si ne soit prie et requise specialment per le gouverneur de la meason, avant que il veigne. Et que nul a ses costages demesne, ne entr', ne veign' giser encounter la volunt ceux de la meason. Et per cel estatute nentend' pas le roy, que grace de hospitality soit sustreit as besoignes (3), ne que les avoues des measons lez puissent per lour souvent venues surcharger ne destruer (4). Purview est ensement, que nul graund ne petit, per colour de parent', ou despecialtie, ou per auter affiance, ne per auter encheson, ne courge en auter parke, ne peshe en auter viver (5), ne veign' manger ne herberger en meason, ne en manour, ou en meason de prelate, ne de home de religion, ne dauter encounter la volunt le seignior,

FIRST the king willeth and commandeth, that the peace of holy church and of the land, be well kept and maintained in all points, and that common right be done to all, as well poor as rich, without respect of persons. And because that abbeyes and houses of religion of the land have been overcharged, and sorely grieved, by the resort of great men and other, so that their goods have not been sufficient for themselves, whereby they have been greatly hindred and impoverished, that they cannot maintain themselves, nor such charity as they have been accustomed to do; it is provided, that none shall come to eat or lodge in any house of religion of any other's foundation than of his own, at the costs of the house, unless he be required by the governor of the house before his coming thither. And that none, at his own costs, shall enter and come to lie there against the will of them that be of the house. And by this statute the king intended not, that the grace of hospitality should be withdrawn from such as need, nor that the founders of such monasteries should overcharge, or grieve them by their often coming. It is provided also, that none high nor low, by colour of kindred, affinity, or alliance, or by any other occasion, shall course in any park, nor fish in any pond, nor come to eat or lodge in the house or

N 4

manor

seignior, ou le bailife, de costages le seignior, ne a son cost demesne. Et sil veigne, ou enter per le gree, ou sans le gree le seignior ou le bailife nul sarure, huis, ne fenestre, ne nul maner de ferme ne faire overer, ne de pecher per soy, ne per auter, ne nul maner de vitail' ne auter chose preigne per colour de achate, ne auterment. Et que nul face barter blee, ne prender blee (6), ne nul maner de vitaille, ne les auter biens, de nulluy prelate, home de religion, ne de auter, ne de clerke, ne de lay, per colour de achate, ne auterment enconter la [bone] volunt, et le conge de celui, a que la chose serra, ou de gardein, deins ville merchandise, ou dehors. Et que nul preigne chivals, bofes, chares, ne charets, neefes, ne bateux, ne auter choses affaire cariage (7), sans le bone volunt * de celui, a que les choses serront. Et si il per la bone volunt de celui le face, lors maintenant face son gree solonque le covenant fait enter eux. Et ceux que viendront enconter les establisments avantdits, et de ceo soient attaints (8), soient adjudges a la prison le roy, et dillonques soient rentes, et punies solonque la quantity et le maner du trespas, et solonque ceo que le roy en sa court veier que bien soit. Et soit assaver, que si ceux a que le trespas fuit fait, voillent suer les damages, que ils avera rescoux, lour serra agarde et restore au double. Et ceux que le trespas averont fait, soient ensement punies in le maner avantdit. Et si nul ne voile suer, eit le roy la suit, come de chose fait enconter son desence, et enconter sa peace. Et le roy serra enquire de an en an, sicome il quidra que bien soit, queux gents eyent tiel trespas fait. Et ceux queux serront endites per ceux enquests, serront attaches et distreign' per la grand distresse, de vener a certain jour, que conteigne le space du moys en la court del roy, la ou luy plerra. Et si ceux ne veigne a cel jour, ils seront auterfoits de recheffe distreigne per mesme distr', de vener a un auter jour, que conteigne le space de vi. semaines. Et si ceux adonques ne veignent, soient

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adjudges

manor of a prelate, or any other religious person, against the will or leave of the lord, or his bailiff, neither at the cost of the lord, nor at his own. And if he come in, or enter with the goodwill, or against the will of the lord or his bailiff, he shall cause no door, lock, nor window, nor nothing that is shut, to be opened or broken, by himself, nor any other, nor no manner of victual, nor other thing, shall take by colour of buying, nor otherwise; and that none shall thresh corn, nor take corn, nor any manner of victual, nor other goods of a prelate, man of religion, nor any other clerk, or layperson, by colour of buying, or otherwise, against the will and licence of him to whom the thing belongeth, or of the keeper, be it within market-town, or without. And that none shall take horses, oxen, ploughs, carts, ships, nor barges, to make carriage, without the assent of him to whom such things belong; and if he do it by the assent of the party, then incontinent he shall pay according to the covenant made between them. And they that offend against these acts, and thereof be attained, shall be committed to the king's prison, and after shall make fine, and be punished according to the quantity and manner of the trespass, and after as the king in his court shall think convenient. And it is to be known, that if they to whom such trespass was done, will sue for damages, they shall be thereto received, and the same shall be awarded and restored to the double; and they that have done the trespass, shall be likewise punished in the manner abovesaid; and if none will sue, the king shall have the suit, as for a thing committed against his commandment, and against his peace: and the king shall make enquiry from year to year, what persons do such trespasses, after as he shall think necessary and convenient; and they that be indicted by such inquests shall be attached and distrained by the great

adjudges come attaints, et rendent le double (per le suit del roy) a ceux queux le dammages averont reseux, et soient grevement rentes, solonque le maner del trespas. Et le roy defende et commande, que nul deormes ne face male (9), damm', ne grevance a nul home de religion, person de saint esglis, ne a auter, per encheson de ces que ils eyent deny lhostelle, ou le manger a nulluy, ou per encheson de ceo que ascun soy pleint ou court, de ceo que il soit greve des ascuns choses avantdits, et si ascun le face, et de ceo soit attaint, soit incurre le peine avantdit. Et est purview que ces points avantdits lient auxibien nous counsellors, justices del forest, et auter nous justices, come auters gents (10): et que les points avantdits soient mainteignes (11), gardes, et tenus. Cy defende le roy sur sa grievie forfeiture, que nul prelate, abbe, prior, home de religion, ou bailife dascun de eux, ou del auter, ne reseive nul home enconter la forme avantdit. Et que nul envoy au meason (12), ne au manor de religion, ne de auter home, gents, chivalx, ne chiens a sojourn', ne nul lez reseive. Et que le ferra, pur ceo que est enconter le* defence et le commandement le roy, il ferra punish grevement. Uncore est purview, que les vic' ne herbergent ove nulluy (13), ovesque plus que v. ou vi. chivalx, ne que ils ne grevoient la gentes de religion, ne auter per lour sovent vener, ou giser a lour measons, ne a lour manors.

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great distress, to come at a certain day, containing the space of a month, into the king's court, or where it shall please the king; and if they come not at that day, they shall be distrained again of new by the same distress, for to come at another day, containing the space of six weeks at the least; and if they come not then, they shall be judged as attainted, and shall yield double damages (at the king's suit) to such as have taken hurt or damage, and shall make grievous fine after the manner of the trespas. And the king forbiddeth and commandeth, that none from henceforth do hurt, damage, or grievance to any religious man, or person of the church, or any other, because they have denied meat or lodging unto them, or because that any complaineth in the king's court that he hath been grieved in any of the things above mentioned; and if any do, and thereof be attainted, he shall incur the pain aforesaid. And it is further provided, that the points aforesaid shall as well bind our counsellors, justicers of forests, and other our justices, as any other persons; and that the aforesaid points be maintained, observed, and kept. Likewise the king forbiddeth upon grievous forfeitures, that no prelate, abbot, man of religion, or bailiff of any of them, or of other, receive any man contrary to the form aforesaid. And that none shall send to the house or manor of a man of religion, or of any other person; his men, horse, or dogs, to sojourn, nor none shall them receive; and he that doth (seeing the king hath commanded the contrary) shall be grievously punished. Yet it is further provided, that the sheriff from henceforth shall not lodge with any person, with any more than five or six horses; and that they shall not grieve religious men, nor other, by often coming and lodging, neither at their houses nor their manors.

(14 Ed. 3. stat. 2. & 3. c. 1. 18 Ed. 3. stat. 3. & 4. c. 4. 1 R. 2. c. 3. Regist. 98. 9 Ed. 2. stat. 1. c. 11.

This chapter doth spread itselfe into thirteen branches.

1. Branch.

(1) *En primes voet le roy, et commaund, que le peace de saint eglise, et de la terre soit bien gard. et mainteine en tous points, et que common droiture soit fait a tous, auxibien as peures, come as riches, sans regard de nulluy, &c.]*

Observe well
this law.

Imprimis rex vult, et præcipit, quod pax sacrosanctæ ecclesiæ, et regni solide custodiatur, et conservetur in omnibus, quodque justitia singulis tam pauperibus, quam divitibus administretur, nulla habita personarum ratione.

Inter leges Ed-
gari Regis.

This is an auncient maxime of the common law repeated and affirmed amongst the lawes of king Edgar: *Primum ecclesia Dei jura et immunitates suas omnes habeto, publici juris beneficio quisque fruitor, eique ex æquo et bono (sive is dives, sive inops fuerit) jus redditor.*

Fleta, lib. i. c.
29.

Fleta reciteth this fundamentall law in few words, *Quod pax ecclesiæ, et terræ inviolabiliter observetur, ita quod communis justitia singulis pariter exhibeatur.*

1 R. 2. cap. 2.
1 H. 4. cap. 1.
2 H. 4. cap. 1.
4 H. 4. cap. 8.
7 H. 4. cap. 1.
&c.

And this law hath been explained and affirmed by divers other acts of parliament.

Britton, fol. 1. saith, *Peace ne poet my bien estre sans ley; therefore this law as a meane, that peace may be kept and maintained, provideth that common droiture (i. justice selonque le ley, & custome d'angleterre) soit fait a tous, &c.*

But this auncient law had great need at this time to be rehearsed, and commanded to be put in execution, for that by reason of the often insurrections, tumults, and intestine warres in the raigne of king Hen. 3. the peace of the church, and of the land was for a long time miserably disturbed, and in a manner overthrown, for of those intestine warres the poet said truly,

Nulla fides pietasve viris, qui castra sequuntur.

And of these seditious subjects, another in the person of the poore ploughman in the like case said;

Virgill.

*Impius hæc tam culta novalia miles habebit?
Barbarus has segetes? en quo discordia civis
Perduxit miseros!*

Another mischief was, that during these tumults and intestine warres, law and justice lay asleep, for *Silent leges inter arma*; but the rule is good, and doth ever hold, *Dormiunt aliquando leges, moriuntur nunquam.*

By all which it appeareth, *quod ex malis meritis bonæ leges oriuntur.*

2. Branch.

Vide lestatute de
Carisle, anno 35
E. 1. Lib. 8. fo.
130. the case of
Thetford schole.
Fleta, li. 3. c. 5.
Britton, fol. 37.

(2) *Purview est que nul ne veigne manger, berberger, ne giser al maison de religion, &c.]* The mischief is at large set downe in this act, wherein it is to be observed, that over and above their owne competent maintenance, the residue ought to be expended in works of charity.

Hereof Fleta saith, *Et ne religioſi per operationes indebitas super-venientium depauperentur, per quod elemosynas et ſervitia ſubtrahere cogantur, vel terras ſuas vendere, vel alienare, ex principis conſtitutione prohibitum eſt, quod nullus beſpitari præſumat in domibus religioſorum de aliena advocacione, niſi ſpecialiter rogatus, nec ſumptibus domus nec ſuis propriis contra tutorum domum voluntatem.*

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(3) *Et*

(3) *Et per cest statute nentend' pas le roy, que grace de hospitalite soit sustreit as besoignes.*] Here it appeareth that the grace of hospitality consisteth in distributing to them that have neede.

3. Branch.

(4) *Ne que les avoies des mesons les puissent per leur servent venues surcharger ne destruer.*] This is evident.

4. Branch.

(5) *Purview est ensement que nul graund ne petit, per colour de parent', ou despecialite, ou per auter affiance, ne per auter encheison, ne courge en auter parke, ne pesse en auter viver, &c.] Hereof Fleta saith, Nec etiam presumat quis temere illicentiatus currere in parco alieno, nec in alterius vivario piscari, veruntamen si contingat aliquis in hujusmodi domibus per licentiam magistri domus vel ejus balivi, quod non aperiat fenestras inhabitas, vel aliquas frangat seruras, et victualia vel alia bona violenter capiat, vel extrahat sub colore emptionis, vel alio quoquo modo, &c.*

5. Branch.

Fleta ubi supra.

Here note that *vivarium*, vivary is here taken for waters where fishes are nourished and kept.

Vide hic. cap. 20.

(6) *Et que nul face barter blee ne prender blee, &c.]* This branch against purveyors doth extend as well to lay, as ecclesiastical persons, and is well explained and confirmed by divers and many statutes.

6. Branch.
Mag. Chart. c. 21.
Artic. Cler. c. 11.

(7) *Et que nul preigne chivals, boefs, chares, ne charets niefs, ne bateux, ne auter chose a faire carriage, &c.]* And by the statutes above said, and many other, this branch concerning cariage is also well explained and confirmed.

14 E. 3. cap. 3.
18 E. 3. c. 3.
Regist. 92.
7. Branch.

(8) *Et ceux queux viendront encontre les establishments avandits, & de ceo soient attaints.]* Here is contained the punishment of such as doe offend against any of these establishments, as well at the kings suit, as at the suit of the party grieved.

8. Branch.

And herewith agreeth Britton, for he saith, *Et auxi des viscounts & des touts nous auters ministres, justices, & coroners. & auters que gents de religion, & auters gents greveront per surcharges de leur venus pur herberger ovesque eux seivent a auter costages, ovesq; trope de frap de gents & per sojourners de leur gents, & de leur chivaux, ou de cheines, ou autrement per empronts de leur chivaux ou de carriage, ou de deniers, ou per begger merime, ou fees, ou auter chose a eux ou a aucun de leur meyne, ou de leur amys, & in ceo case soient puny per fins.*

Brit. fol. 37.

(9) *Et le roy defend, & command que nul desformes face male damage, &c.]* This clause extends as well to lay as ecclesiastical persons.

9. Branch.

(10) *Et est purview que ceux points lient auxibien nous counsellors, justices de forests, et auters justices, et auters gents.]* Of these two branches Fleta saith thus, *Item nec graventur viri religiosi, personæ ecclesiasticæ, vel alii, pro eo quod vetuerunt hospitium, vel victualia alicui, vel pro eo, quod quæsi fuerunt de aliquo gravamine eis illato in prædictis articulis contento, quod si quis fecerit, et inde convincatur, puniatur per pœnam supradictam, nec excipiantur in præmissis consilarii regis nec justici' de foresta, vel alii quicunque justiciarii vel ministri regis, non magis quam medicos, vel minores.*

10. Branch.

Fleta ubi supra.

(11) *Et que les points avandits soient mainteynes, &c.]* This branch extends as well to lay, as ecclesiastical persons.

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Consilarii Regis.

11. Branch.

(12) *Et que nul envoie a meson, &c.]* This is also as general as the former.

12. Branch.

Note it is an article, *inter capitula itineris de hiis qui miserunt*

13. Branch.
Fleta ubi supra.

ad domus vel maneria religiosorum homines, equos, vel canes perbendinando ad custum eorum.

(13) *Uncore est purview que viscounts ne herbergent ove nulluy, &c.]* Of this Fleta saith, *De vic' provisum est quod non hospitentur alicubi nisi propriis sumptibus, veruntamen concessum est, quod in domibus religiosorum vicissim per unam noctem tantum cum sex equis, et non pluribus sumptibus alienis in suis balivis hospitentur, dum tamen frequenter non venerint.* See cap. Itineris de vicecomitibus venientibus ad hospitandum cum pluribus quam 5. vel. 6. equis in balivis suis, vel qui per frequentes adventus ultra quosunque oneraverint.

Here is to be observed that often in Fleta, and other old authors and statutes this word *perbendinare* is used, which signifieth to sojourn, and *perbendinationes* signifieth sojourning.

36 E. 3.
cap. Itin. Vet.
Magna Cart.
154

And that we may note once againe for all, whensoever an act of parliament doth generally prohibit any thing, as in this chapter it doth, the party grieved shall not have his action onely for his private reliefe, but the offender shall be punished at the kings suit for the contempt of his law; and therefore upon this statute it shall be inquired at the kings suit, *De hiis qui miserunt ad domos vel maneria religiosorum vel aliorum homines, equos, vel canes perbendinando ad custum eorum, et de vicecomitibus venientibus ad hospitandum cum pluribus quam quinque vel sex equis in balivis suis, vel qui per frequentes adventus ultra quosunque oneraverint.*

C A P. II.

PURVIEW est ensement, que quant clerke est prise pur rette de felony, et il soit demande per lordinary, il luy soit liver, selonque le priveledge de saint esglise, en tiel peril come ils appent (1), selonque le custome avant ses heures use. Et le roy amonist les prelates, et eux enjoine en la foy que ils luy doient, et pur la common profit de la peace de la terre, que ceux que sont endites de tiel rette per solempne questes des probes homes fait en la court del roy, en nul manner ne les deliverent (2) sans due purgation (3), issint que le roy neit mestier de mitter auter remedy.

IT is provided also, that when a clerk is taken for guilty of felony, and is demanded by the ordinary, he shall be delivered to him according to the privilege of holy church, on such peril as belongeth to it, after the custom aforesometimes used. And the king admonisheth the prelates, and enjoineth them upon the faith that they owe to him, and for the common profit and peace of the realm, that they which be indicted of such offences by solemn inquest of lawful men in the king's court, in no manner shall be delivered without due purgation, so that the king shall not need to provide any other remedy therein.

Marlb. cap. 27. (18 El. c. 7. Hob. 288. Chart. de Pardon, Br. 21. 23 H. S. c. 11.)

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The mischiefs before this statute were three: 1. That the ordinary would often challenge one for a clerk that was none. 2. That when any that were or had ability to be of the clergy, were indicted of felony, the ordinary would presently demand them, and the court would deliver them without inquisition. But
always

always after this statute, the court took an inquisition of office, *Ut sciatur qualis ordinario deliberari debeat*. 3. That the ordinaries would often deliver them without due purgation, whereby the king lost his forfeiture, and offences remained unpunished.

(1) *En tiel peril come il appent.*] The peril was, that if the ordinary should demand any man for a clerk that was none, his temporalities should be for that contempt seised, and some have holden that he should lose that franchise or privilege to demand clerks for him and his successors for ever; but see the statute of 25 E. 3. cap. 6. for since that statute it hath been holden but finable.

(2) *Que ceux queux sont endites de tiel rette per solemne enquest des probes homes en la court le roy in nul manner ne delivreront sans due purgation.*] Before this statute if any clerk had been arrested for the death of a man, or any other felony, and the ordinary did demand him before the secular judge, he was delivered without any inquisition to be made of the crime; and this appeareth by Bracton, who writing before this statute saith, *Cum verò clericus, &c. captus fuerit pro morte hominis, vel alio crimine, et imprisonatus, et de eo petatur curia christianitatis ab ordinario loci, &c. imprisonatus ille statim ei deliberetur sine aliqua inquisitione facienda.*

But after this statute, to the end that the ordinary might have more care of purgation to be duly done according to the provision of this act, when any clerk was indicted of any felony, and refused to answer to the felony, but claimed *privilegium clericale*, and was demanded by his ordinary, yet before he was delivered to the ordinary, all the records say, *Sed ut sciatur qualis ei (s. ordinario) liberari debeat, inquiratur inde rei veritas per patriam*: and thereupon an inquisition was taken whether he were guilty of the fact or no, and if he were found guilty, his goods and chattels were forfeit, and his lands seised into the hands of the king.

Britton, that wrote after this statute, saith, *Si le clerk encoupe de felony (i. indite ou appeale de felony) alledge clergie, & est tiel trowe (s. q. est un clerke) & p. lordinary demaund, donques serra inquis comment il est mescrue (i. culpable) & sil soit nient mescrue, &c. donques il serra aroge tous quits, & sil soit mescrue si soient ses chateux taxes, & ses terres prises in nostre maine, & son corps deliver al ordinarie*: so as by the one author, who wrote a little before this statute, and the other who wrote presently after (together with the continuall practise thereof) the diversity doth appeare.

Monachus indictatus de feloniam, petit privilegium clericale, abbas præsens petit eum tanquam suum professum, et ad hoc fuit admissus loco ordinarii, inquisitio capta ex officio dixit quod non culpabilis, ideo quietus recessit, et si culpabilis inventus fuisset, ad huc dicto abbati liberaretur, &c.

But of the allowance of the benefit of clergy upon the arraignment, it was very prejudiciall to the prisoner, for that he lost his challenges to the inquest, that found him guilty, and yet upon the inquest of office formerly used, *ut sciatur qualis ordinario liberari debet*, he forfeited all his goods, and chattels, and the profits of his lands untill he had made his purgation: and therefore that thrice reverend and learned judge sir John Prisot chiefe justice of the court of common pleas, studying how to relieve the poore prisoners that were destitute of counsell, with the advice of the rest of the judges in the raigne of H. 6. for the safety of the innocent,

would

20 E. 2. Coro.
233.

26 Aff. 19.
7 H. 4. 36.
9 E. 4. 28.

25 E. 3. cap. 6.

Le statute de Bigamis, cap. 6. &
Artic. Cler. ca.
15.

Bract. l. 3. fo.
123.
Artic. Cler. c. 15.

Brit. c. 4. fo. 11.

8 E. 2. Coro.
417.
17 E. 2. ibid.
386.
3 H. 7. 12.

3 H. 7. fo. 1. 124

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would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and having had the benefit of his challenges and other advantages, had been convicted thereof: which just and charitable course hath been generally observed ever since.

18 Eliz. cap. 6.

(3) *Sans aue purgation.*] Before this statute, purgations were unduly made, more for favour, then for furtherance of justice, whereby malefactors were encouraged to offend; wherefore the king admonished and enjoined by this act of parliament the prelates upon the faith which they ought unto him, &c. to deliver no clerks, that were indicted, without due purgation, as they tendered the common profit of the peace of the land. But this royall admonition and injunction (and many other in succeeding ages, as it by parliament rolls appeareth) tooke little effect, but the abuses in making purgations in the end became so intollerable, as queene Elizabeth, by assent of the lords spirituall and temporall, and the commons in parliament assembled, as matter unreformable, tooke it quite away; but yet, what the law was therein before that statute, is good to be knowne, and therefore somewhat shall be said thereof in the treatise of the pleas of the crowne, being the proper place for the same.

CAP. III.

PURVIEW est ensement, que nul rien desormes soit demande, ne prise, ne levie per viscount, ne per auter, pur escape de laron; ou selon, j'esque a tant que lescape soit adjudge per justices errants (1). Et que autrement le ferra, cy rendra a celui, ou a ceux que tiel averont pay, quant que il avera prise et resceivre, et au roy au tant.

IT is provided also, that nothing be demanded nor taken from henceforth, nor levied by the sheriff, nor by any other, for the escape of a thief or a felon, until it be judged for an escape by the justices in eyre. And he that otherwise doth, shall restore to him or them that have prayed it, as much as he or they have taken or received, and as much also unto the king.

Regist. 184. cap. Itineris. Vct. Mag. Chart. 154. (21 Ed. 3. f. 54.)

18 E. 2. Stat. de visu Franc.

The mischief before this statute was, that sheriffes in their tournes, and lords in their leets, who had jurisdiction to enquire of escapes of theeves and felons, upon presentment before them of such escapes, would levie fines or amerciaments for such escapes, for that they pretended that the said presentment was not traversable: now forasmuch as it required judgement in law to discern betweene a voluntary escape and a negligent in case of felony, and also what should be judged an escape, and what not, they might enquire onely, and the judgement thereupon belonged to the justices in eyre.

This statute doth declare, that nothing should be demanded, taken, or levied by any sheriffe, or other, untill the escape be adjudged by the justices in eyre, and addeth a penalty if any such thing be done.

For

For proof whereof, we find before the making of this statute, *Quod evasiones latronum secundum legem et consuetudinem regni coram justiciariis regis itinerantibus, et non alibi, debeant et consueverunt judicari, et amerciamenta inde provenientia per summonitionem scaccarii sunt levanda.* We find also in the same yeare, that before this act of 3 E. 1. was made another record, *Quia evasiones latronum coram justiciariis regis itinerantibus, et non alibi judicari debent, mandatum est vicecomiti quod restituat 8. l. W. C. quas ab eo cepit pro evasione cujusdam hominis, &c.* Now that the common law, the mischiefe before the statute, and the purview of the statute be understood, let us peruse the words of the act.

(1) *Per viscount, ne per auter, &c. jesque a tant que le scape serra adjudge per justices errants.*] By these words the court of the kings bench, which is holden *coram rege*, is not excluded, but presentment of such escapes may be made there: First, for that this prohibition beginneth with sheriffes, and therefore the generall words [or by any other] shall be intended of leets, being inferiour courts, and not of the justices of the kings bench, being the highest of any ordinary court of justice in England. Secondly, for that the court of the kings bench is an eire (the returnes there being *ubicumq; fuerimus in Anglia*) and more than an eire; for if the kings bench had come into a county where the eire had sit, the eire had ceased, for in *presentia majoris cessat potestas minoris*.

But by the statute of 31 E. 3. it is enacted, that escapes of theeves and felons, &c. from henceforth to be judged before any of the kings justices shall be levied from time to time as they shall fall, as well in the time past, as in the time to come.

Rot. clauf.
2 E. 1. m. 11.

Mirror, ca. 2.
lect. 9.

Rot. clauf.
3 E. 1. m. 15.

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Lib. 2. fol. 46.
Marleb. c. 19.
28.
Hic cap. 15.

21 E. 3. 54. b.
21 ass. 12.
27 ass. p. 2.

Regula.
31 E. 3. cap. 14.
stat. 1.
1 R. 3. cap. 3.

C A P. IV.

DE wreck de mere (1) est accorde, que la ou home, chien, ou chat (2) escape vive hors de la niese, la niese ou batell, ou nul rien, que la eins fuit, ne soit [adjudge] wreck, mes soient les choses saves et gardes par le vieu del vicont, coroner (3), ou al', ou del bailiffe le roy, et bailes en les mains ceux de la ville, ou les choses sont troves, issint que si nul sue les biens, et puit prover que ils soient, ou a son seignour, ou en sa garde peris, deins lan et le jour (4), sans delay luy soient rendus: si non, remaigne au roy. Et soient prises per le vie' et coroners, et bailes a la ville pur respoign' devant justices de w ecke que appent a roy (5). Et la ou wrecke appent a auter que au roy (6), ci le eit per m'sne le maner. Et que auterment fra, et de cco soit attaint, soit a garde

CONCERNING wrecks of the sea, it is agreed, that where a man, a dog, or a cat escape quick out of the ship, that such ship nor barge, nor any thing within them, shall be adjudged wreck: but the goods shall be saved and kept by view of the sheriff, coroner, or the king's bailiff, and delivered into the hands of such as are of the crown, where the goods were found; so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king, and be seised by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the justices of the wreck belonging

garde al prison, et rent al volunt le roy (7), et rendra les dammages ensement. Et si le bailife le face, et soit disavow de son seignour, et le seignour ne ottrie de ceo a luy, respoign' le bailife, sil eit de quoy, et sil neit de quoy, rendra le seignour le corps du bailife au roy.

belonging to the king. And where wreck belongeth to another than to the king, he shall have it in like manner. And he that otherwise doth, and thereof be attainted, shall be awarded to prison, and make fine at the king's will, and shall yield damages also. And if a bailiff do it, and it be disallowed by the lord, and the lord will not pretend any title thereunto, the bailiff shall answer, if he have whereof; and if he have not whereof, the lord shall deliver his bailiff's body to the king.

Customier de Norm. cap. 17. (5 Rep. 106. 5 Ed. 3. 3. Bro. Wreck, 1. 17 Ed. 2. stat. 1. c. 11. 12 Ann. stat. 2. c. 18.)

Doct. & Stud.
cap. 51. fo. 156.

Many have doubted what the common law was before the making of this statute; and some have holden, that the common law was, that the goods wrecked upon the sea were forfeited to the king, and that they be forfeited also since the statute, unless they be saved by following this statute. To this I answer with Macrobius, *Multa ignoramus, quæ nobis non laterent, si veterum lectis nobis esset familiaris*: for Bracton, who wrote before this statute, proveth, that this act is but a declaration of the common law, *Magis propriè dici poterit wreccum, si navis frangatur, et de qua nullus vivus evaserit, et maxime si dominus rerum submersus fuerit, et quicquid inde ad terram venerit, erit domini regis, &c. et quod hujusmodi dici debeant wreccum, verum est, nisi ita sit, quod verus dominus aliunde veniens per certa indicia et signa docuerit res esse suas, ut si canis vivus inveniat, &c. Et eodem modo si certa signa apposta fuer' mercibus et aliis rebus.*

Bract. li. 3. fo. 120.
Brit. fo. 7. 26. 85.
Flet. li. 1. c. 41.

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Mirr. c. 1. § 13.
& c. 3. § de wrecks.

The Mirrour saith, *A lour view, (s. les coroners) de wrecks a les appent denquirer ou les wrecks vient a terre, quel les choses, combien & la value distinctement per parcells. Et si home, beste, oisell, ou autre chose vivant vint avecq; ou non, & essint per dividend soit liivre a la prochein ville, un ou plusors pur ent responder al vercy seigneur (i. proprietarie) si la vient challenger, & defresuer de deins lan.*

And albeit this author wrote after this statute, yet he wrote of the ancient lawes before the same, and is more large then the words of the act: for therein is named onely of a man, a dog, and a cat, that escapeth alive; and this author speaketh generally of any beast, hawke, or other living thing, so as he pursueth not this act, but treateth of the common law.

Rot. cart. añ.
20 H. 3. Rot.
claus. 14 H. 3.
m. 6. Vide li. 5.
fo. 107. Sir
Henry Constables
case.
Customier de
Norm. c. 17.

Rex pro salute animæ suæ, et ad malas consuetudines abolendas, concessit, quod bona in mari periclitata non perdantur nomine wrecci, quando aliquis homo, aut bestia vivus de navi evaserit. And now having cleared this point, let us peruse the words of our act.

(1) *De wreck de mere.*] Wrecke or shipwrecke is an English word, in French, *nauffrage*, in ancient French, *varech*, in Latine, *nausfragium*, legally *wreccum maris*, wrecke of the sea in legall understanding is applied to such goods as after shipwreck at sea are
by

by the sea cast upon the land, and therefore the jurisdiction thereof pertaineth not to the lord admirall, but to the common law.

Although this statute speaketh onely of wrecke, yet this statute extendeth to stotfam, jetsam, and lagan: for which see sir Henry Constables case, lib. 5. *ubi supra*.

The cause wherefore originally wrecke was given to the crowne, stood upon two maine maximes of the common law; First, that the property of all goods whatsoever must be in some person. Secondly, that such goods, as no subject can claime any property in, doe belong to the king by his prerogative, as treasure trove, straves, wrecke of the sea, and others; because of ancient time, when the art of navigation was not so perfect, nor trade of merchandize grown to such perfection, as now it is, it was a matter of great difficulty to be proved, in whom the property of goods wrecked at sea was. Braſton saith, *Item tempore dicuntur res in nullius bonis esse, ut thesaurus. Item ubi non apparet dominus rei, sicut est de wrecco maris. Item de hiis quæ pro via habentur, sicut de averiis ubi non apparet dominus, quæ olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* Others have yeelded another reason, that the king by old custome of the realme, as lord of the narrow sea, is bound to scoure the sea of the pirats and petie robbers of the sea: and so it is read of that noble king Edgar, that he would twice in the yeare scoure the sea of such pirats, &c. and because that could not be done without great charge, the law gave unto him such goods as be wrecked upon the sea towards the charge.

If a ship be ready to perish, and all the men therein for safeguard of their lives leave the ship, and after the forsaken ship perisheth, if any of the men be saved and come to land, the goods are not lost.

A ship on the sea is pursued with enemies, the men for safeguard of their lives forsake the ship, the enemies take the ship, and spoile her of her goods and tackle, and turne her into sea, by the weather she is cast on land, where her men arrived, and it was resolved by all the judges of England that the ship was no wrecke, not lost.

(2.) *Home, cheine, ou cat.*] This statute, as hath beene said, being but declaratorie of the common law, these three instances are put but for examples, for besides these two kind of beasts, all other beasts, fowles, birds, hawkes, and other living things are understood, whereby the ownership or property of the goods may be knowne: and Braſton yet goeth farther, *Si certa signa apposita fuerint mercibus, et aliis rebus, &c.*

(3) *Mes soient les choses saves & gardes pèr le vieu del vise, corroyer, &c.*] Yet if the goods be bona peritura, the sheriffe may sell such goods within the yeare, lest they should perish, and nothing be made of them; and therefore for necessity (which is excepted out of law) the sale in that case is good within the yeare.

(4) *Et poient prover, &c. deins l'an & le jour.*] Yet if the owner die within the yeare, his executors or administrators may make prooffe, for that this act is but a declaration of the common law.

This yeare and day shall be accounted from the seisure made as wrecke, for that is the thing whereof the owner may take the best notice.

II. INST.

O

But

5 E. 3. 3.

11 H. 4. 16.

F.N.B. 112. e.

Sir Hen. Const.

case, ubi sup.

Braſt. li. 1. fo. 8.

9 H. 6. 45.

Rot. pat. 25 E. 1.

m. 23. in dorf.

the Merchants

of Portugals case.

46 E. 2. 15.

Rot. clauf. 5 R.

2. pro Willielmo

Fishlake.

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Braſt. ubi furrâ,

fo. 120. 27 E.

3. c. 13. by his

mâks cart or

cocket, 31 H. 6.

c. 4. 2 R. 3. fo.

2. a.

Pl. Com. 466.

D. A. & Stud.

fo. 118.

35 H. 6. 27. per

Notingham.

Sir Hen. Const.

case, ubi supra.

35 H. 6. 27.

But if the kings goods be wrecked, and cast upon ground, where a subject hath wreck of the sea, who seiseth the same, the king may make his proofes at any time when he will, and is not confined to a yeare and a day, as the subject is.

Regist. fo.

F.N.B. 112.

Now if the goods or merchandises so cast upon the land be not seised, as is aforesaid, but taken away by certaine wrong doers not knowne, the partie may have a commission of oier and terminer to enquire of them, that did the trespasse, and to heare and determine the same, and to make restitution to the partie.

Vide Rast. Pl.

cor. fol. 611.

15 R. 2. cap. 3.

(5) *Devant les justices del wrecke que appent al roy.*] That is, it shall not be tryed in the admirall court, but before the kings justices at the common law, because the wrecke is ever cast upon the land.

(6) *Et la ou wrecke appent al auter que au roy, &c.*] Wrecke may belong to the subject, either by graunt from the king, or by prescription.

Braft. li. 3. fo.

120.

Britt. 7. 26. 85.

Of ancient time, wrecke of the sea, and other casualties, as treasure trove in the land, frayes, and the like, were *primi inventoris quasi totius populi, sed postea ad regem translata fuerunt, quia non modo totius populi, sed reipublicæ etiam caput est*: but if treasure be found in the sea, the finder shall have it at this day.

2 R. 3. fol. 11.

Vide hic ca. 9.

20. 24. 25. 26.

29.

(7) *Et rent al volunt le roy.*] That is, be fined at the kings will, which is to be understood, that the kings justices, before whom the party is attainted, shall set the fine, *Et non dominus rex per se in camera sua, nec aliter coram se, nisi per justiciarios suos: Et hæc est voluntas regis, viz. per justiciarios, et legem suam, unam esse dicere.*

CAP. V.

ET pur ceo que elections doivent estre frankes; cy defend le roy sur la greewe forfeiture (1), que nul haute home, ne auter, per poyar des armes, ne per malice ou manaces, ne disturbe de faire franke election.

AND because elections ought to be free, the king commandeth upon great forfeiture, that no man by force of arms, nor by malice, or menacing, shall disturb any to make free election.

Art. super cart. cap. 8. & 13. 33 H. 8. cap. 27. Dier, 3 El. 247. 14 H. 8. 2. 29. 31 Eliz. cap. 6. (Br. Amercement, 6. 13. 32. 35. 37. 9 Ed. 2. stat. 1. c. 14.)

7 H. 4. cap. 14.

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See the statute of 7 H. 4. that knights of shires for the parliament shall be chosen *libere et indifferenter sine prece aut præcepto*.

There were two mischiefs before the making of this statute. 1. For that elections were not duly made. 2. That elections were not freely made; and both these were against the ancient maxime

Regula

of the law, *Fiant electiones rite et libere sine interruptione aliqua*; and again, *Electio libera est*; for before this act in the irregular reign of H. 3. the electors had neither their free, nor their due elections, for sometimes by force, sometimes by menaces, and sometimes by malice the electors were framed, and wrought to make election of men unworthy, or not eligible, so as their election was neither due, nor free: this act briefly rehearseth the old rule of the common

7 H. 6. 12.

mon law (for that elections ought to be free) wherein both the said points are included; 1. It must be a due election, and 2. It must be a free election.

This statute doth enact, that no man upon grievous forfeiture shall disturb any to make free election, and is excellently penned in two respects; first, for that generally it extendeth to all elections, that is to say, to every dignity, office, or place elective, be it ecclesiasticall or temporall, of what kinde or quality soever. Secondly, the act is penned in the name of the king, viz. the king commandeth: and therefore the king bindeth himself not to disturb any electors to make free election, as in the like case upon a statute made in the raigne of the said king; the act saying, *rex perpendens*, &c. the same bound the king. Now that electors might make free and due elections without displeasure or fear thereof, by this act of parliament, as a sure defence, the king commandeth the same upon grievous forfeiture: and this act extends to all elections, as well by those that at the making of this act had power to make them, as by those whose power was raised, or created since this act.

(1) *Greve forfeiture.*] That is, the disturbers to be punished by grievous fines and imprisonment.

What offices and places be eligible, see Artic. super Chart. cap. 8. and this act extendeth to all elections in counties, universities, cities, corporations, and other places.

And thus much shall suffice for the understanding of this excellent and necessary act. See hereafter cap. 10.

W. 2. 13 E. 1 c. 1.
Pl. Com. The
Lord Berklics
case.

14 H. 4. 20, 22.
Stamf. Pl. Cor.
163. c. d. 12 E. 2.
Coro. 381. 22 E.
3. ibid. 275.
Dier 12 E. 289.
semble.

Art. super
Chart. ca. 8. &
vide hic. ca. 10.

C A P. VI.

*ET que nul city, borough, ne ville,
ne nul home soit amerce sans rea-
sonable encheson, et solonque le quantity
del trespassse (1), s. franke home savant
son contenment, merchant savant son
merchandise, et villein savant son
gainage, et ceo per lour peeres.*

AND that no city, borough, nor town, nor any man be amerced, without reasonable cause, and according to the quantity of his trespassse; that is to say, every free-man saving his freehold, a merchant saving his merchandise, a villain saving his waynage, and that by his or their peers.

Cap. Itin. Vet. Mag. Chart. fol. 164. b. (Regist. 187. 9 H. 3. stat. 1. c. 14.)

One mischief before this statute was, that seeing the words of the statute of Magna Charta were *Liber homo non amercietur*, &c. it extended not onely to naturall and singular men, but to sole bodies politike or corporate, and not to corporations, or companies aggregate of many, as cities, boroughs, and towns. Another mischief was, that many times not onely cities, boroughs, and townes, but private men also were amerced without cause. Lastly, that the said statute of Magna Charta extended but to him that was *liber homo*.

For all these three this statute provideth, viz. that no city, bo-
rough

Mag. Chart. ca.
14.

13 E. 1. Attach-
ment 2.
F.N. B. 170.

rough or town, nor any man shall be amerced without reasonable cause, and according to the quantity of his trespassse, and upon this statute the party grieved may have an attachment without any prohibition precedent; for this act is a prohibition of it selfe.

Mirror, c. 5. § 4.

And yet the Mirror doth take it, that all this was contained in the graund charter.

Stat. voc. Ragman anno 4 E. 1.

(1) *Quantity of trespassse.*] Here trespassse, *transgressio* signifieth offence, fault or default, and so it is taken in many auncient records, as taking one example for many: the statute, that is called Ragman, ordaineth that justices shall goe through the land, to enquire, heare, and determine the plaints and querels of trespassses, as well of the bayliffes and ministers of the king, as of the bayliffes of others, and of other people whatsoever they be, except appeales of felony, &c. which was understood as well of outrageous takings, as of all manner of trespassse, contempt, neglect; default, or offence to the king or any other, &c.

Fleta, lib. 2. c. 1.

And in that sence the apostle saith, *Ubi non est lex, ibi non est transgressio*. Fleta describing it saith, *Transgressio autem est, cum modus non servatur nec mensura, debet etenim quilibet in facto suo modum habere et mensuram.*

C A P. VII.

DES prises des constables, ou castelains, faits des auters que des gens de la ville, ou la castles sont assise. Purview est, que nul constable ne castelain desormes nul manner de prise ne face dauter home que de la ville ou son castle est assise, et ceo soit paie, ou gree fait deins xl. jours, si ceo ne soit auncient prise due au roy, ou a castle, ou al seignior del castle.

OF prises taken by constables, or castellains, upon such folk as be not of the town where the castle is; it is provided, that no constable, nor castellain, from henceforth exact any prise, or like thing, of any other than of such as be of their town or castle; and that it be paid, or else agreement to be made within fourty days, if it be not an antient prise due to the king, or to the castle, or to the lord of the castle.

Cap. Itineris vet. Mag. Chart. fol. 154. b. (9 H. 3. stat. 1. c. 19. Altered by 13 Car. 2. stat. 1. c. 8.)

Fleta, lib. 2. ca. 43.

Of this chapter Fleta saith thus, *Nulle prise capiatur de aliquo per aliquem constabularium castellanum, præterquam de villa, in qua situm sit castrum, et illis satisfacti sit infra 40 dies, nisi sint prisæ antiquæ debiti regi aut domino castri aut castro debendæ.*

Mag. Chart. c. 19.

Upon the statute of Magna Charta, and this act, there were two articles amongst others, that the justices in eyre enquired of, *viz. De prisis factis per vicecomites, vel constabularios, vel alios balivos contra voluntatem eorum quorum catalla fuerint: item de prisis domini regis sive in terra, sive in mari, sive in aqua dulci, sive in libertatibus spectantibus ad castra sua, sive ad civitates suas, sive ad burgos suos, vel in aliis locis, quæ sunt, et quantum valeant, vel quis eas occupaverit, celaverit, vel suffocaverit, et quis eas ceperit, constabularius, vel alius, et quid valeant.*

Bracton.

Bract. li. 3. fo. 117.
De prisfis domini regis in terra, sive in aqua dulci, sive salsa, et libertatibus spectantibus ad castella sua, sive ad comitatum, sive ad burgos suos, quæ sunt, et quantum valeant per annum.

Brit. fol. 27.
Et auxi des prises faits, per nous castellans, & autres que sont pervers de vittaille, ou de autre chose, per queux tiels prises ont estre faits, & a queux damages, & de quels gents, & en tiel case, voillons nous que nul ne soit garrant per continuance de seisin in damage.

Fleta ubi supra.
De prisfis factis per vicecom. constabularios, vel alios contra voluntat' eorum quorum catalla illa fuerint: item de prisfis constabulariorum castrorum factis de bonis aliorum, quam eorum, qui sunt de villis, ubi castra sita sunt, et de bonis eorum, &c. si non satisfact' fuer' infra 40 dies, &c.

It is to be observed, that in the raigne of this king, and in most of the succeeding kings, there have been many other statutes made concerning purveyors, yet never did any reporter publish any case, that I have seene, and remember, that may serve for the exposition of any of them, and many proceedings have beene judicially upon many of them against purveyors, which doe appeare of record. *Vide Magna Charta, cap. 19. and the exposition thereof, and the third part of the Institutes, cap. Purveyors.*

C A P. VIII.

ET que nul fine soit prise pur beaulpleder, sicome autrefois fuit despendu en temps le roy Henry, pier le roy que ore est.

AND that nothing be taken for fair pleading, as hath been prohibited heretofore in the time of king Henry, father to our lord the king that now is.

(52 H. 3. c. 11. 1 Ed. 3. stat. 2. c. 8. Regist. 179.)

That is to say, by the statute of Marlebridge, anno 52 H. 3. Marleb. cap. 11. where this matter is explained.

C A P. IX.

ET pur ceo que la peace de la terre ad estre feiblement garde avant ces heures, pur defalt de bone suit fait sur les felons selonque due manner (1), et nosment per encheson des franchises ou les felons sont resceves: purview est, que tous communement soient prestes, et aparailles, au commandement et a les summons des viscounts (2), et au crie de pays (3), de suer et arrester les felons (4), quant,

AND forasmuch as the peace of this realm hath been evil observed heretofore for lack of quick and fresh suit making after felons in due manner, and namely because of franchises, where felons are received; it is provided, that all generally be ready and apparelled, at the commandment and summons of sheriffes, and at the cry of the country, to sue and arrest felons, when

quant mestier serra, auxibien deins franchises come dehors (5). Et ceux que ceo ne ferront, et de ceo soient attaintes, le roy prendra a eux grevement (6). Et si le default soit trouve en le seignior de la franchise, le roy se prendra mesme le franchise (7). Et si le default soit trouve en le bailife, eit lenprisonment dun an (8), et puis soit grevement rente, et sil neit de quoy, eit lenprisonment de ii. ans. Et si viscount, coroner, ou autre bailife deins franchise, ou dehors (9), per lower, ou per prier, ou * per poies, ou per nulmanner daffinity, concealent, consentent, ou procurent de conceler les felonies faits en leur bailies, ou autrement, se teignent attacher, ou arrester les misfesants per la ou ils purra, ou autrement se feignent de faire leur office, en nul maner de favour des misfesants, et de ceo soient attaintes, que ils eient lenprisonment dun an (10), et puis soient grevement rentes a le volent le roy (11), sils eient de quoy, sinon, eient lenprisonment de iii. ans.

* [172]

when any need is, as well within franchise as without; and they that will not so do, and thereof be attainted, shall make a grievous fine to the king: and if default be found in the lord of the franchise, the king shall take the same franchise to himself; and if default be in the bailiff, he shall have one year's imprisonment, and after shall make a grievous fine; and if he have not whereof, he shall have imprisonment of two years. And if the sheriff, coroner, or any other bailiff within such franchise, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, consent, or procure to conceal, the felonies done in their liberties, or otherwise will not attach nor arrest such felons there, as they may, or otherwise will not do their office for favour born to such misdoers, and be attainted thereof; they shall have one year's imprisonment, and after make a grievous fine at the king's pleasure, if they have wherewith; and if they have not whereof, they shall have imprisonment of three years.

(4 Ed. 1. stat. 2. *Officium Coronat.* 13 Ed. 1. stat. 2. c. 1, 2. & 6. 28 Ed. 3. c. 11. 7 R. 2. c. 6. 27 Ed. 3. c. 13. 39 Ed. 3. c. 25.)

(1) *Pur default de bone sute fait sur les felons in due manner.* Some have thought that hue and cry have been grounded upon this statute, but this act proveth that hue and cry for the apprehension of felons was before this statute, for it findeth fault that good suit, that is, fresh suit, was not duly made; and it appeareth that hue and cry in those cases hath been by the auncient laws of this realme.

Mirror, ca. 1.
§ 3.

The author of the Mirror writing of the auncient laws before the conquest under the title *Des articles des viels royes ordeines*, saith, *Ordeine fuit que chescun del age de xiiii. ans, & oustre de mortels pecheors ensuivre de ville, & ville a hue and cry.*

Inter leges Regis Canuti.

Si quis latroni ob-viam dederit, eumque nullo edito clamore abire permiserit, quancunque fuerit latronis-vita estimata, extremum solvat denariolum, aut pleno et perfecto jurejurando de facinore nihil habuisse cogniti confirmato. Sin quis proclamantem audierit, neque vero fuerit infectus, suæ in regem contumaciæ (ni omnem criminis suspicionem diluerit) pœnas dato.

Glanv. li. 14.
c. 3.

Glanvill calleth hue and cry *clamor popularis juxta assisam* (i. *statutum*) *super hoc prodictam*. But this statute is not now extant.

Bract. l. 3. f. 121.

Bracton of hue and cry saith, *Statim et recenter investiganda sunt vestigia malefactorum, et sequenda per ductum carecie, passus equorum,* et

et vestigia hominum, et alio modo, secundum quod consultius et melius fieri possit.

And it is one of the articles of that auncient court of the view of frankpledge (of whose antiquity we have spoken before) to enquire of hue and cries levied and not pursued.

All these authorities were before the making of our act, and therefore it was truly said, whosoever said it, *Pervetusta Anglorum lege sancitum est, ut si quis damnum ex furto passus, aut qui ipsum spoliatum viderit, fontem per acclamationem insequatur, constabularius ejus villæ cujus opem implorat, auxilia cære furemque perquirere debeat; quod si furem illic non deprehenderit, in proximam commigrare, et constabularium ad ferendas suppetias iterum invocare, &c.*

Of this hue and cry our auncient authors since our statute have also written, and divers acts of parliament have since been made, concerning hue and cry, as the statute *De officio coronatoris*, made the next yeare after our act, where it is said, *Et omnes sequantur butesum, et vestigium, si fieri potest; et qui non fecerit, et super hoc convictus fuerit, attachietur, quod sit coram justiciariis de gaola, &c.* 28 E. 3. & 27 Eliz.

(2) *Au commandement et a les summons des viscounts, &c.*] Men ought to be in these cases at the commandement of the sheriffe, for he hath *custodiam comitatus* committed to him; and he that goeth not at the commandement of the sheriffe or constable at the cry of the country, that is, upon hue and cry, shall be grievously fined and imprisoned.

(3) *Ou a crie de pais.*] Note, in legall understanding hue and crie is all one; in ancient records they are called *butesum et clamor*, and here crie is used for both. And this hue and crie may be by horne and by voice, *avec hue & crie de corne & de bouche*. Now the hue and crie shall be made, and all incidents thereunto, you shall reade in the abovesaid statutes, and in our reports you shall find how the same have been expounded.

(4) *De fuer & arrester les felons.*] By these words it is holden, that there must be a felonie done, or else the arresting of the party, though it be upon hue and cry, is unlawfull, because it wanteth a foundation; but if a felonie be done, and the hue and cry is against one, that is neither indicted, nor of ill fame, nor suspicious, nor unknowne, yet the arrest of him is lawfull, though he be not guilty; for the hue and cry of it selfe is cause sufficient, where there is a foundation of a felonie committed. And he that levieth hue and crie upon another without cause, shall be attached and punished for disturbance of the kings peace.

(5) *Auxibien deins franchises come dehors.*] This was not intended of sanctuaries, but of lords, and others, that had franchises of insangthesfe, outfangthesfe, and the like.

(6) *Le roy prendra eux grevement.*] That is, at the kings suit they shall be fined grievously, and imprisoned.

(7) *Et si le default soit trouve in le seignior de la franchise, le roy se prendra a mesme le franchise.*] It seemeth hereby, that the franchise is lost for ever, for the words be, that the king shall take to himselfe the franchise (*viz.* as forfeit.)

(8) *Et si le default soit trouve en le bailife, eit lenprisonment dun an, &c.*] And this is according to the old rule, *Qui non habet in ære, luet in corpore.*

Mag. Chart. c. 35.

Brit. fol. 19, 20.
Fleta, lib. 1. ca. 24.
Anno 4 E. 1.
4 E. 1. De Offic. Coro. Vid.
13 E. 1. Stat. de Winch.
28 E. 3. ca. 11.
27 Eliz. ca. 13.
Cap. Itin. Vet.
Mag. Chart. 155.
W. 2. cap. 29.
5 H. 7. 5. a.
2 H. 7. 15. b.

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Mirr. cap. 2.
Britt. ubi sup.

Lib. 7. fo. 6, 7.
Dier 23 El. 37c.

29 E. 3. 39.
11 E. 4. 4. b.
5 H. 7. 5.
2 H. 7. 15.

Præc.
Precio.
Metu.
Sanguine.

Favore.

(9) *Et si viscant, coroner, ou auter bailife de franchise, ou de bovs, &c.]* Note here five things are rehearsed, as causes wherefore sheriffs, and other the kings officers and ministers of justice doe neglect their duties. 1. By prayer, *prece* (by letters, messages, or word of mouth.) 2. Reward, *precio* (fardid bribery.) 3. Feare, *metu* (the basest, and yet the most forcible of all affections.) 4. *Sanguine*, any manner of consanguinitie or affinitie: under which word (affinitie) in this act is included as well neerenesse of blood, as alliance by marriage. Lastly, *favore*, favour, in respect of friendly affection, for men may be corrupted, not onely by reward, but in respect of the other foure also, all tending to one and the same end, to suppress truth; as here to conceale, consent, or procure to conceale the felonies done within their severall precincts or bayliwicks.

(10) *Ils eyent lenprisonment dun an, &c.]* Note here the punishment for concealment of felonies, or consenting to, or procuring the concealment of the same; for all this make not them necessary to the felony, for then they were to have been punished in another manner, but it is called misprision, or concealment of felony. Observe well the punishment of this misprision, but the learning thereof appertaines to the treatise of the pleas of the crowne, and therefore this little touch here shall suffice. See the 3. part of the Institutes, cap. Misprision.

(11) *Al volant le roy.]* See here cap. 4. 20. 25.

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C A P. X.

ET pur ceo que petits gents meins sages soient eslieus (1) ore de novel. communement al office de coroner: et mestier serroit que probes homes loialx et sages se intermellent de cel office: purvieu est, que per tous les counties soient eslieus suffisant (3) homes coroners (2), des plus loyals et plus sages chevalliers (4), queux melius sachent, puissent, et voient a cel office entendre (5), et que loyablement attachent et representent les ples de la corone (6). Et que le vicont eit conter-rolles ove les coroners, auxy bien des appeales, come des enquestes, de attachments, ou des auters choses, que a cel office appendent. Et que nul coroner riens demande, ne preign de nulluy pur faire son office, sur paine de la greeve forfeiture al roy (7).
[14 E. 1. Stat. Exon.]

AND forasmuch as mean persons, and undiscreet, now of late are commonly chosen to the office of coroners, where it is requisite that persons honest, lawful, and wise, should occupy such offices; it is provided, that through all shires sufficient men shall be chosen to be coroners, of the most wise and discreet knights, which know, will, and may best attend upon such offices, and which lawfully shall attach and present pleas of the crown; and that sheriffs shall have counter-rolls with the coroners, as well of appeals, as of enquestes, of attachments, or of other things which to that office belong; and that no coroner demand nor take any thing of any man to do his office, upon pain of great forfeiture to the king.

Cap. Itin. fo. 155. (23 Ed. 3. c. 6. 1 H. 8. c. 7. 4 H. 6. 15. 4 Ed. 1. Stat. 2. *Officium Coronator.* 3 H. 7. c. 1.)

The mischief before doth appeare in the preamble, *viz.* That men of small value and little understanding, of late times were chosen to the office of a coroner, where it should be needfull that a coroner should have five qualities: 1. That he should be *probus homo*: 2. Lawfull, *i. legalis homo*: 3. Of sufficient understanding and knowledge: 4. Of good ability and power to execute his office according to his knowledge: 5. and lastly, Of diligence and intendance for the due execution of the said office. And reason required it should so be, for that coroners were in those dayes the principall gardeins of the peace, and therefore the common law did not onely require expert men to be coroners, but men of sufficient ability and livelihood for three purposes: 1. The law presumes that they will do their duty, and not offend the law, at the least for feare of punishment, whereunto their lands and goods be subject. 2. That they be able to answer to the king all such fines and duties as belong to him, and to discharge the country thereof, wherewith the country being their electors were chargeable, as hereafter shall be touched. 3. That they might execute their office without bribery. And these five properties are necessary to every officer. *Vide* the last clause of this act.

(1) *Soient effieus.*] It is to be knowne, that the office of a coroner ever was, and yet is eligible in full county by the freeholders, by the kings writ *De coronatore eligendo*: and the reason thereof was, for that both the king and the country had a great interest and benefit in the due execution of his office, and therefore the common law gave the freeholders of the county to be electors of him. And for the same reason of ancient time the sheriffe called *vicecomes*, who had *custodiam comitatus*, was also eligible; for first, the earle himselfe of the county had the office of the theriffe of the county, and when he gave it over, the *vicecomes* (as the word signifieth) came in stead of the earle, and was eligible by the freeholders of the county: and moreover, for the same cause were conservators of the peace in like manner chosen, and so were, and yet are elected the verderors of the forest, and all these for the time of peace: for the time of war, there were likewise leaders of the counties souldiers, of ancient time chosen by the freeholders of the county.

*Erant et alie potestates et dignitates per provincias et patrias universas, et per singulos comitatus totius regni prædicti constitutæ, qui Heretoches apud Anglos, vocabantur, scilicet barones, nobiles, et insignes sapientes, et fideles et animosi: Latine verò dicebantur duces exercitus, apud Gallos, capitales constabularii, vel marescalli exercitus. Illi verò ordinabant acies densissimas in præliis, et alas constituiebant prout decuit, et prout eis visum fuit, ad honorem coronæ, et ad utilitatem regni. Isti verò viri * eligebantur per commune concilium pro commune utilitate regni, per provincias et patrias universas, et per singulos comitatus in pleno Folkemote, sicut et * vicecomites provinciarum et comitatum eligebant, &c.*

The Mirreour speaking of the articles by old kings ordained, saith, *Auxi fuer' ordeines coroners in chescun counie, et viscounts a garder le pais, quant les countes soy demiseront del gard, &c.* And the sheriffe was chosen by writ directed to the coroners.

And so were the conservators of the peace eligible also, by writ directed to the sheriffe.

Vide devant, c. 5.

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Inter leges Edw. regis, cap. de Heretochiis.

* Nota.

* Nota.

Mirr. cap. 1. § 3.

Rot. pat. an. 5 E. 1.

For

For the verderor, he is still chosen by the freeholders of the county by the kings writ.

Art. super cart.
an. 28 E. 1.
c. 8. 13.
Vide supra.

Our king in the 28 yeare of his raigne restored to his people the ancient election of sheriffes in these words, *Le roy ad grant a son people, que ils eint election de leur viscount en chescun countie, ou viscount nest my de see, silz voillont.*

12 R. 2. cap. 2.
Vide Stat. 9 E. 2.
De Vic. 14 E.
3. 7.

But now by the statute of 12 R. 2. the chancellor, treasurer, keeper of the privy seale, steward of the kings house, the kings chamberlaine, clerke of the rolls, justices of the one bench and of the other, barons of the exchequer, and all other that shall be called, are to ordaine, name or make sheriffes, shall be firmly sworne that they shall not ordaine, name, or make any sheriffe, for any gift or brocage, favour or affection, but that they shall be of the most lawfull men, and sufficient, to their estimation and knowledge.

Dier, 1 El. fo.
165.

It is holden in our books, that albeit the king dieth, yet the coroner, because he is elected by the freeholders of the county by writ, and retourned of record in the chancery, which is a judicall act, remained, and so of the verderor: otherwise it is of judges and justices, that hold their places by writ, commission, letters patents, or otherwise at will, which might be a reason wherefore the sheriffe of ancient time was eligible, for that he had *custodiam comitatus*, and a principall conservator of the peace; and therefore his authority should not cease by the death of the king, no more then that of the coroner.

In Scaccar. inter
præcept. Term.
Hill. anno
14 E. 3. ex parte
Rememb.
Regis. 20 H. 9.

Now seeing that coroners are elected by the county, if they be insufficient, and not able to answer such fines and other duties in respect of their office, as they ought, the county as their superiour shall answer the same: as for example, the county of Kent made election, by force of the kings writ, of William Herlizon to be one of the coroners for the same county, who after was amerced *pro falso retourn* 40s. whereupon proccesse went out to the sheriffe to levie it; the sheriffe upon his oath said, that the said William Herlizon *non habet terras vel tenementa, bona seu catalla in baliva sua, nec habuit, unde dicti denarii levare possint*: now saith the record, *Et quia ipse coronator electus fuit per comitatum, &c. ita quod in defectu ejusdem coronatoris totus comitatus ut elector et superior, &c. tenetur regi respondere; præceptum fuit nunc vicecomiti, quod de terris et tenementis hominum totius comitatus in baliva sua fieri faceret prædicti* 40s. And the like law was of the sheriffe, and other the said officers, when they were eligible. But now let us returne to the purview of our act.

Respondcat superior.

23 aff. p. 7.
14 H. 4. 34.
39 H. 6. 40.
1. N.B. 163. k.

(2) *Homes coroners.*] The number of coroners are not set down by law: in most counties there are foure, in some counties fixe, in some fewer, and in some counties one.

For the word *coronator*, see Mag. Cart. cap. 17.

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Li. 8. fo. 41.
Greiffes case.
F.N.B. 163. n.
4 E. 1. de offic.
Coronat'.

(3) *Sufficiens.*] *Sufficiens* is a large word, and implies as much as *idoneus*, and it hath two of the attributes mentioned in the preamble, that is lawfull, and sage.

14 E. 3. cap. 7.
Brit. 3. b. Flet.
lib. 1. cap. 18. 25.
23 aff. p. 7. Mag.
Char. c. 17.
F.N.B. 164.

(4) *Chivaliers.*] In ancient times none were chosen under the degree of knighthood to be coroners. But some say, that this word (*chivaliers*) was put into this statute, to the end that the party to be chosen might have sufficient in the county, which may serve for interpretation of divers other statutes, being accompanied with use and experience.

(5) *Quæx*

(5) *Queux melius sciunt, possint, et velint a cel office entendre, &c.] Qui melius sciunt, possint, et velint officio illi intendere, &c.* Note well these three qualities.

Now what causes there be to remove a coroner, *vide* Regist. & F. N. B.

(6) *Que les coroners loialment attachent et representent les plees del coron, &c.]* By this it appeareth, that the coroner is judge of the cause, and not the sheriffe; and this agreeth with our old and latter books, onely the sheriffes have counter-rolls with the coroners by force of this act, and therefore a *certiorari* may be directed to the sheriffe and coroner to remove an appeale by bill before the coroner, because the sheriffe hath a counter-roll: but if the *certiorari* be directed to the sheriffe onely in case of appeale or indictment of death, it is not sufficient to remove the record, because he is not judge of the cause, but hath onely a counter-roll. *Vide* Magna Chart. cap. 17. many authorities cited there concerning this matter.

(7) *Et que nul coroner riens demand, ne preigne de nulluy pur faire son office, sur peine de la greve forseiture al roy.]* And this was the ancient law of England, that none having any office concerning administration of justice, should take any fee or reward of any subject for the doing of his office, to the end he might be free and at liberty to doe justice, and not to be fettered with golden fees, as fetters to the suppression or subversion of truth and justice: and therefore this statute was made in affirmance of the common law; this onely is added, *sur paine de greve forseiture al roy.*

A coroner received 1 d. of every visne when they came before the judges in eire, as belonging to his office, which was neither against the common law, nor this statute; for he tooke it not for doing of his office, but a right due to his office, which might have a reasonable beginning, *viz.* for and towards his travaile, attendance, and charges.

And this statute stood in force untill the statute made in 3 H. 7. ca. 1. which gave him a fee of xiii. s. iiii. d. upon the view of the body, of the goods of the murderer, &c.

But if the coroner sit upon the view of any slaine by misadventure, he shall have nothing. More shall be said hereof hereafter, cap. 26.

See the next chap. & chap. 36.
See hereafter Stat de milit.
Regist. 177. b.
F. N. B. 163. m.
Regist. & F. N. B. ubi sup.
Mirr. lib. 1. cap. de office de Coron. Bract. H. 3. fo. 121.
Britt. fol. 3.
Flet. lib. 1. ca. 18. & 25. 4 E. 1. Stat. de officio. Coronat. Regist. jud. 16. 22 ass. 98. 4 H. 6. 16. Mag. Char. c. 17. Hic cap. 14. 4 H. 6. ubi supra.
14 E. 1. Stat. de Exonia.
3 H. 7. cap. 1. Vide hic c. 26. See 5 E. 6. c.

3 E. 3. coron. 372.

3 H. 7. cap. 1.

1 H. 8. cap. 7.

CAP. XI.

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ET pur ceo que plusors reintes de mort de home, et que sont culpables de mesme la mort sont (per favorables enquests, prises per visconts et per bre' le roy que est appelle odio et atia) replevies, j'esques a la venue des justices errants: purview est, que tiel enquests soient desormes prises per probes homes eslieus per serement, dount les deux soient a meines chivalers' que per nul affinitie,

AND forasmuch as many being indicted of murther, and culpable of the same, by favourable inquests taken by the sheriff, and by the king's writ of *odio et atia*, be replevied unto the coming of the justices in eyre; it is provided, that from henceforth such inquests shall be taken by lawful men chosen out by oath (of whom two at the least shall be knights) which by no affinity

affinitie, touchent a les prisoners, ne auterment ne soient suspelious. [Gloc. c. 9. West. 2. c. 29.] affinity with the prisoners, nor other-wise, are to be suspected.

(5 H. 7. f. 5. Regist. 133. 9 H. 3. stat. 1. cap. 26. 6 Ed. 1. stat. 1. c. 9.)

Mag. Cart. ca. 26.

See the 26 chapter of Magna Charta where this matter is handled at large, and need not here to be repeated, and how this writ *De odio et atia* was taken away, and since revived by a later statute, as there it appeareth.

C A P. XII.

PURVIEW est ensement, que les felons (1) *escries, et queux sont apertement de male fame* (2), et ne sy voient mitter en enquests des felonies (3), que homes met sur eux devant justices a la suit le roy (4), soient mises en la prison forte et dure (5), come ceux queux refusent estre al common ley de la terre. Mes ceo nest mye a entendre pur prisoners que sont prises per legier suspicion.

IT is provided also, that notorious felons, and which openly be of evil name, and will not put themselves in enquests of felonies, that men shall charge them with before the justices at the king's suit, shall have strong and hard imprisonment, as they which refuse to stand to the common law of the land. But this is not to be understood of such prisoners as be taken of light suspicion.

(Dyer, 205. Kel. 70. 8 H. 4. 2. 4 Ed. 4. 11. 14 Ed. 4. 7. 21 Ed. 3. 8. Fitz. Coron. 233. 283. 359.)

15 E. 4. 32.
Sta. n. pl. cor.
150.

(1) *Que les felons.*] This statute extendeth not to treason, which is the highest offence, nor to petit larceny, which is of all felonies the lowest.

Tr. 40. El coram
Rege, Rot. 4.
Jane Wisemaas
casc.

This act doth extend as well to women as to men, and so it doth appeare by divers auncient and late precedents, and to that end the makers of this act did use this generall word, felons.

(2) *Escries et apertement de male fame.*] No person shall be put to this punishment unlesse the matter be evident or provable, which is the duty of the judge to look unto.

(3) *Ne soy voient mitter en enquests des felonies.*] This act speaketh onely of indictments at the suit of the king. But the judgement of *paine forte et dure* was at the common law, both in appeales, and in indictments.

43 Aff Pl. 30.
8 H. 4. 1.
4 E. 4. 11.
7 E. 4. 29.
14 E. 4. 7.

A man may stand mute two manner of wayes; first, when he stands mute without * speaking of any thing, and then it shall be inquired, whether he stood mute of malice, or by the act of God; and if it be found, that it was by the act of God, then the judges of the court (who ever are to be of counsell with the prisoner, to give him law and justice) *ex officio* ought to inquire whether he be the same person, and of all other pleas which hee might have pleaded, if hee had not stood mute.

And note well the abovesaid words of our books [whether of malice, or by the act of God] for it may be, the prisoner in truth cannot

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cannot speake, and yet being not mute by the act of God, he shall be forthwith put to his penance, as if the delinquent cut out his owne tongue, and thereby become mute.

Another kinde of mute is, when the prisoner can speake, and perhaps pleade Not guilty, or pleade a plea in law, and will not conclude to the enquest according to this act; or speake much, but doe not directly answer, &c. for *idem est nihil dicere, et insufficienter dicere*: to be short, when in the end he will not put himselfe upon the enquest, that is, *de bono et malo* to be tried by God and the countrey, then this act is sufficient warrant, if the cause be evident or probable, to put him to his penance; but if he demurre in law, and it be adjudged against him, he shall have judgement to be hanged: and though by his demurrer he refuse to put himselfe upon the enquest according to the letter of this act, yet for as much as he is out of the reason of this act, for that he refuseth not the triall of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he shall not be put to his penance, but have judgment to be hanged; and so it is if he challenge above the number of 36. he shall be hanged, and not have *paine fort et dure*.

4 E. 4. 17.
7 E. 4. 29.
14 E. 4. 7.

(4) *Al fute le roy.*] This act extends not to the suit of the party by appeale, because the judgement of *paine fort et dure* was both in appeale and indictment at the common law, as hath been said, and hereafter shall be said and proved.

3 H. 7. 2. & 12.

(5) *Soient mys en la prison fort et dure.*] Upon these words there have beene divers opinions; first that the punishment of *paine fort et dure* was given by this act.

Stamf. Pl. Cor.
149. f.

Some other have holden, that at the common law for felony the prisoner standing mute should upon a *nihil dicit* be hanged, as at this day it is in case of high treason, and, as they say, in case of appeale. Others have holden that at the common law, in favour of life he should neither have *paine fort et dure*, nor have judgement to be hanged, but to be remaunded to prison untill he would answer.

8 H. 4. 2.
Stamf. Pl. Cor.
ubi supra.
21 E. 3. 18.

For the finding out of the truth herein, let us first see, what the judgement, which our act calleth *fort et dure* is, and then what the reason should be, that so severe a judgment is given in that case.

The judgement is, that the man or woman shall be remaunded to the prison, and laid there in some low and dark house, where they shall lie naked on the bare earth without any litter, rushes, or other clothing, and without any garment about them, but something to cover their privy parts, and that they shall lie upon their backs, their heads uncovered and their feet, and one arme shall be drawne to one quarter of the house with a cord, and the other arme to another quarter, and in the same manner shall be done with their legges, and there shall be laid upon their bodies iron and stone, so much as they may beare, and more, and the next day following they shall have three morsels of barley bread without any drink, and the second day they shall drinke thrice of the water that is next to the house of the prison (except running water) without any bread, and this shall be their diet untill they be dead.

8 H. 4. 1.
4 E. 4. 11.
Tr. 40 El. ubi
sup.

So as upon the matter they shall die three manner of wayes, *viz. Onere, fame, et frigore*, by weight, famine, and cold, and therefore this punishment (if it were executed according to the severity of

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of the law) should be of all other the most grievous and fearfull. But what should be the reason of this so terrible a judgement? This act answereth, because he refuseth to stand to the common law of the land, that is, lawfull and due triall according to law, and therefore his punishment for this contumacy without comparison is more severe, lasting, and grievous, then it should have beene for the offence of felony it selfe; and for the felony it selfe, it cannot be adjudged without answer.

Now let us examine the opinions above said, and we hold, that none of them are consonant to law; for as to the first, we hold that this heavy punishment was not given, that is, first inflicted by this act: for what court, or judges upon these words [have strong and hard imprisonment] could frame such a judgement as is above said, consisting upon so many divers particulars? and therefore it must necessarily follow, that the said punishment which this statute calleth *fort et dure* imprisonment, because the penance was to be done in prison, was before this act, but sufficiently signified (as it hath beene ever since) by these two epithets, *fort et dure*; so as this act setteth forth the quality of the judgement, and not the judgement it selfe.

2. This act describeth what persons shall be punished by *paine fort et dure*, *viz.* notorious felons, and which be openly of ill name, but setteth not downe (as hath been said) what the punishment is, but provideth it shall not be for legier suspicion.

3. All books, that held with great authority, that in case of appeale the prisoner upon standing mute should have judgement *de paine fort et dure*, do prove that such a judgement was before the making of this act, for this statute extends not to appeales, which are the suit of the subject, but onely to the suit of the king, which is by way of indictment: and herein the words of Fleta are very remarkable, *Si autem appellatus nihil respondere velit, &c. et appellans inde petierit judicium, indefensus remanebit, morti tamen non condemnabitur, sed gaolæ committetur, &c.* And there setteth downe the penance, which of necessity must be (as hath been said) by the common law. And herewith agreeth Britton that wrote soone after this act; so as the penance in case of appeale, is both by auncient and sound authority.

To the second opinion, if the prisoner standing mute should be hanged by the common law; the answer to the first doth answer this also, and if he should be hanged by the common law, this statute taketh it not away, but ordaineth that he shall have strong and hard imprisonment. And therefore by their opinion, the felon standing mute might be hanged at this day, which is against all our books, and against constant and continuall experience.

To the third, let no man imagine that the common law, which is the absolute perfection of reason, could foster so unreasonable and unjust a meane of encouragement of felons, that they by their owne contumacy against the common law should suffer onely one of the lowest punishments, *viz.* imprisonment untill they would answer; and the answers to the first are answers to this also.

Now let us see what our auncient authors (who as you have often perceived, have heretofore beene our good guides) say in this behalfe.

You have already heard Fleta; and Britton also mentioneth this penance in two severall places, both upon the indictment, and in the

Mirror, cap. 5.

§ 4.

41 Aff. p. 30.

8 H. 4. 1.

4 E. 4. 11.

14 E. 4. 7.

3 H. 7. 2.

Fleta, li. 1. c. 32.

Britton, fo. 40.

Fleta ubi supra.

Britton ubi supr.

Britton, fo. 11.

a. & 40. b.

the appeale, and voucheth no statute therefore, as no doubt in this case he would, as in other like cases he had done, and specially, seeing he wrote soone after this statute, hee would have mentioned the act that had inflicted so strange and stupendious a punishment, if the statute had not beene made in affirmance of the common law.

And the Mirror saith, *In peche de homicide chient mortalmement ceux que occient home in prison per surcharge de peine en case quant aucun est judge al penance.* And in another place writing upon our very chapter, hee saith, *Le point de mitter gents rêttes de felony, que se ne voillent mitter in pais, a penance, est cy disuse que ben les tue sans aver regard as conditions des persons, &c.* This author, as hath been said, writeth of the auncient law long before this act, as he himselfe testifieth in the beginning of his booke. He calleth this punishment of *paine forte et dure* (the penance) because it is the greatest and most severe penance, and paine of all other, and so it is commonly called in our books.

Mirror, c. 1. § 9.

Mirror, c. 5. § 4.

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C A P. XIII.

ET le roy defende, que nul ne ravise ne preigne a force (1) damaselle deins age (2), ne per son gree, ne sans son gree, ne dame ne damaselle de age, nauter feme mauger le soen. Et si ul le face, a le suit celuy que fuera deins les 40 jours, le roy luy fra common droiture. Et si nul commence la suit deins les 40 jours, le roy fuera, et ceux queux il trovera culpables, ils averont la prisonnement de ii. ans, et puis seront rentes, a la volunt le roy, et fils neient dont estre rentes, soient punies per plus longe prisonnement, solonque ceo que le trespassse demande.

AND the king prohibiteth that none do ravish, nor take away by force, any maiden within age (neither by her own consent, nor without) nor any wife or maiden of full age, nor any other woman against her will; and if any do, at his suit that will sue within fourty days, the king shall do common right; and if none commence his suit within fourty days, the king shall sue; and such as be found culpable, shall have two years imprisonment, and after shall fine at the king's pleasure; and if they have not whereof, they shall be punished by longer imprisonment, according as the trespass requireth.

Cap. Itineris. 155. 4 E. 1. Offic. Coronatoris. Vide Pasc. 6 E. 1. Rot. 4. in Banco Lanc. W. 2. 13 E. 1. ca. 34. 6 R. 2. ca. 6. 4 & 5 Ph. & Mar. ca. 18. 18 Eliz. c. 6. Regist. fo. 97. (22 Ed. 4. 22. 1 Inst. 123. b. 2 Inst. 180. 2 Rep. 37. Hob. 91. 13 Ed. 1. stat. 1. c. 34. 6 R. 2. c. 6.)

For the better understanding of this and other statutes concerning rapes, it is first to be seene, what this word [rape] doth signifie, and secondly, what offence rape was at the common law before this statute.

This is well described by the Mirror, *Rape solonque le volunt del estatute est prise pur un proper mote done pur chescun assorcement de fem, de quelle condition q. el soit;* but better in another place, rape is, when a man hath carnall knowledge of a woman by force, and against her will; and, as the Mirror saith, it is a proper word; and *rapere* to ravish legally signifieth as much, as *carnaliter cognoscere*,
 8
 and 9 E. 4. 26.

Mirror, ca. 1. § 12.

See the first part of the Institutes, sect. 190.

Third part Inst. cap. Rape. and 9 E. 4. 26.

and cannot be expressed in legall proceeding by other words, as elsewhere hath been said.

Glan. li. 1. c. 2.
lib. 14. ca. 6.
Mirrour, c. 4. de
homicide.
Bracton, lib. 3.
fo. 147.
Brit. fo. 3. 7.
39. 45.
Fleta, l. 1. c. 25.
33.

The offence is called *raptus*, and the offender *raptor*. This offence was felony at the common law, but had a punishment under such a condition as no other felony had the like, that I have read of; for first, divers of our aunient authors, that wrote before our statute, agree, that of old time rape was felony, for which the offender was to suffer death, but before this act the offence was made lesser, and the punishment changed, *viz.* from death, to the losse of the members whereby he offended, *viz.* his eyes, *propter aspectum decoris, quibus virginem concupivit. Amittit etiam testiculos, qui calorem supri induxerunt*; so as it was no felony at the making of this act: and in those dayes if the offender in the appeale brought by her, that was ravished, had been condemned by the country, without any redemption he should lose his eyes and his privy members, unlesse she that was ravished before judgement demaunded him for her husband; for that was onely in the will of the woman and not of the man: for if (say they) it should have been in the will of the man, this inconvenience might have followed, that a ribaud, or a rascall slave might ravish a noble-woman, and by occasion of one shamefull pollution, perpetually to defile her, and to the dishonour of her house to take her to wife.

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But admit that the ravisher had been a nobleman, and the woman ravished base and ignoble, it might be thought that the like inconvenience might follow, if in that case the woman should have the election. *Responsio; quod siue vir nobilis, siue ignobilis sit, voluntas semper erit faminae, et electio; quia quod est in famina voluntarium, in viro erit necessarium, ut membra sua redimat ex necessitate: cum igitur mulier habeat electionem, et spreto iudicio petit eum in virum, conceditur ei de gratia domini regis ob favorem matrimonii.*

Mirr. cap. 4. de
homicide.

And herewith agreeth the Mirrour; that before the time of our king Edw. the 1. the punishment was by castration and putting out of the eyes of the offender, &c. but of ancient time at the common law it was death at the election of the single woman ravished.

Li. 2. controversiarum, contr'
5. and 24.

And that also was the law amongst the Romans, for Seneca saith, *Rapta raptoris aut mortem, aut indotatas nuptias optet*: upon which law there arose this case, *Una nocte quidam duas rapuit, altera mortem optat, altera nuptias*: there the case is largely and doubtfully disputed, which in our law would make but little question; for though the one for the offence done to her might take him to her husband, yet shall he suffer death according to the law for the offence done to the other.

Inter leges regis
Canuti.

Int. leges Aluredi regis.

Now let us heare what the law was herein before the conquest, *Qui viduam per vim stupravit proprii capitis astimatione compensato, nec mitiori conditione qui virgini vim intulerit. Qui per vim pagani hominis ancillam stupravit, pagano sol' senos numerato, et 60 praeterea sol' mulctator: servus autem si servulam stupravit, virga virilis ei praeciditur; qui tenera aetatis virginem stupravit, eadem lege tenetor, qua is qui adultam compresserit.*

See the 1. part
of the Inst. sect.
190.

And if the lord had ravished his niese or bondwoman, she might have had an appeale of rape against her lord, as at this day she may.

Bract. ubi supra,
& li. 3. fo. 123.

And the punishment abovesaid, *viz.* the losse of the said members in such sort, as Bracton expressed the same, continued untill
the

the making of this act; the purpose of which act was once againe to change the punishment, and yet to make it lesser, that is, to make it punishable by fine and imprisonment at the kings suit, if she pursued not her remedy within forty dayes, as by this act appeareth.

But it is not credible what ill successe this act, that mitigated the former punishment, had; for many ill disposed persons taking upon this occasion encouragement to follow the heat of lust, did many shamelesse and shamefull rapes in barbarous and inhumane manner: as taking one example for all, Warren de Henwicke ravished openly in the high way Matild the daughter of Syward de Warton, and after he came and desired to have her to his wife, which was granted by the justices, and was affianced to her in open court.

This crying sin daily increasing, our noble king, ten yeares after this act, made rape by authority of parliament felony, as by the statute in that case provided, appeareth.

Now this that hath been said doth agree with our books, and therefore it is *benedicta expositio*, when our ancient authors, and our yeare books, together with constant experience doe agree: for if rape had not been made felonie by the statute of W. 2. but had been felony when that act was made, then should the court of the leet have enquired of it, as of a felonie by the common law; but seeing it was made felonie by that statute, it hath been often adjudged, that the leet cannot inquire thereof: for albeit it was once felonie, yet the nature of the offence being changed, as is above-said, to be no felonie, when another act made it felonie againe, yet could not the leet enquire thereof, as of a felonie, which is worthy of observation.

More shall be said of rape in the treatise of the pleas of the crowne, and when we come to the said statute of W. 2. cap. 34.

(1) *Ne preigne a force.*] The taking away by force of a woman whatsoever * against her will, albeit there be no rape, &c. is generallly prohibited by this act, upon the penalty hercin expresied.

Deins age.] Here it shall be taken for her age of consent, that is 12 yeares old, for that is her age of consent to mariage; and the taking her away within that age, whether she consent or no, is prohibited by this act. Whereof, notwithstanding all the above-said statutes, good use may be made, because it is generall, and not bound with so many fetters as some of them be. See more hereof in the third part of the Institutes, cap. Rape.

Hil. 6 E. 1. in
com. banc. Rot.
4. Lanc'.

W. 2. 13 E. 1.
c. 34.

18 E. 2. Stat. de
visu franc'.
9 E. 4. 26.
22 E. 4. 22.
1 R. 3. 1. 6 H.
7. 4. 11 H. 7.
22.
Dier, 3 El. 201.

Regist. fo. 97.
22 E. 4. 22.
Rast. pl. 496.
Dier, 9 El. 256.

* [182]

C A P. XIV.

*ET pur ceo que home ad use en ascun
pays de utlager les gentes appeales
de commandement (1), force (2), aide
(3), ou de receiptment (4), deins mesme
la terme, que home doit utlager celuy
que est appelle de fait: purvieu est et
conmaunde per le roy, que null' ne soit
II. INST.*

utlage

AND forasmuch as it hath been
used in some counties to outlaw
persons being appealed of command-
ment, force, aid, or receipt within the
same time that he which is appealed
for the deed, is outlawed; it is pro-
vided and commanded by the king,
that

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utlage pur appelle de commandement, force, aide, ou de receiptment, j'esque a taunt que lappellee del fait (5) soit attainit (6), issint que un mesme ley soit de ceo per tout la terre (7), mes celuy que voit appeller, ne lessa pas pur ceo de attacher son appelle, al prochein cunte (8) vers ceux, auxibien come vers les appellees du fait: mes le exigent de eux demurge (9) tanque les appellees de fait soient attainits per utlagarie, ou autrement.

that none be outlawed upon appeal of commandment, force, aid, or receipt, until he that is appealed of the deed be attained, so that one like law be used therein through the realm: nevertheless he that will so appeal, shall not, by reason of this, intermit or leave off to commence his appeal at the next county against them, no more than against their principals, which be appealed of the deed; but their exigent shall remain until such as be appealed of the deed be attained by outlawry, or otherwise.

Utlage, utlagatus, exlex. Utlagaria, exlegalitas. Vide Lam. inter leges Ed. Confess. cap. 38. 3. Part of the Inst. ca. Appeals. Un mesme ley. (9 Rep. f. 119. Plowd. 97. 2 R. 3. 21. 9 H. 7. 19. 20 Ed. 4. 7. 7 H. 4. 36. Fitz. Coron. 10. 12. 33. Rast. pla. f. 42. 47, 48.)

3 Part of the Inst. ca. Principall et Acc.

Here are accessaries divided into two parts, *viz.* to accessaries before the fact, and to accessaries after the fact.

Againe, accessaries before the fact are divided into three branches: *De commandement, force, et aid*; accessaries after the fact is only by recitement.

(1) *Commandement.*] *Præceptum.* Under this is understood all those that incite, procure, set on, or stir up any other to doe the fact, and are not present when the fact is done.

(2) *Force.*] *Fortia*, is a word of art, and properly signifieth the furnishing of a weapon of force to doe the fact, and by force whereof the fact is committed, and he that furnisheth it is not present when the fact is done: for these two words, *præceptum, et fortia*, heare what Bracton saith, *Ubi factum nullum, ibi fortia nulla, nec præceptum nocere debet.* And againe, *Vulnus, fortia, et præceptum, generant unicum factum; non esset vulnus forte, si non adfuisset fortia; nec vulnus, nec fortia, nisi præceptum præcessisset:* and sometimes in a large sence is taken for any that is accessary before the fact.

Bract. li. 3. fo. 139.
Britt. li. 5. b.
Mirr. ca. 1.
§ 13.
40 ass. 25.

Eleta, li. 1. c. 23.

Et potest quis corporaliter occidi, facto, et lingua.

(3) *Aide.*] *Auxilium.* Under this word is comprehended all persons counselling, abetting, plotting, assenting, consenting, and encouraging to doe the act, and are not present when the act is done; for if the party commanding, furnishing with weapon, or aiding, be present when the act is done, then is he principall.

(4) *Resciment.*] This is understood after the fact done, that is, when one knowing the felonie doth receive the felon, and not only conceale his offence, but favour and aid him, that he be not knowne.

In the preamble the mischief is recited, that before this act in some countries it had been used to outlaw accessaries within the same time, that the principall was outlawed. Here it is to be understood, that in those dayes most appeals of death, &c. were sued by bill in the county before the coroner, in which bill of appeale the appellant doth make a distinction betweene the principall and the accessary. And therefore this act is intended of appeales commenced

43 E. 3. 17.
18. 34.

commenced by bill, for in the appeale by originall writ, both principalls and accessaries are generally charged alike, without any distinction, who be principalls, and who be accessaries, untill the plaintife maketh his counte, and therein he must distinguish them; but if the defendants in such an appeale, where some be principalls, and some accessaries, make default, the appellant before the exigent ought to declare, to the end it may be knowne who be principalls, and who be accessaries, and to take the exigent onely against the principalls, and continue the plea against the accessaries, untill the principalls be attained; for if the plaintife should pray an exigent against them all, he is concluded afterward to charge any of them as accessaries.

This act was made in affirmance of the common law, and it doth not hold onely in appeals at the suit of the party, but in indictments also at the suit of the king: for it is an ancient and fundamentall maxime of the common law, *juri non est consonum, quod aliquis accessorius in curia regis convincatur, antequam aliquis de facto fuerit attinctus*: yet if the accessary will, he may pray proces against the enquest before the principall be attained, for *quilibet potest renunciare juri pro se introducto*.

(5) *Tesque lappellee del fait soit attain.*] If the principall wage battaile, and is slaine in the field, yet he is not attained, but the judgement must be, that he was vanquished in the field, *Ideo consideratum, quod suff. per coll., &c.* And this was agreed by the justices, for otherwise in this case the lord should have no escheat, nor any outlawrie could be sued by the appellant against the accessarie.

Our act speaketh *appellee* in the singular number; yet in an appeale brought against two as principalls, and against another as accessarie to them, in this case both of them must be attained before the accessary be outlawed; and if one of the principalls be found not guilty, the accessarie is discharged, for the plaintife made him accessary to two, and therefore he cannot be found accessary to one. But where there be divers principalls, the appellant may have his appeale against any one of them, and make the accessary accessary to him only, if he will, for the felonie is severall, but the appellant cannot have severall appeals of one death.

In case of poysoning, albeit the delinquent be not present when the poyson is received, yet is he principall, and so the principall and accessarie may be both absent.

It is to be observed, that in the highest offence, and lowest injury, there are no accessaries, but all be principalls; as in treason, petit larcenie, and trespassse.

And in one case of felonie all be principalls as well before as after, though they be absent at the doing of the felonie; but that is specially provided by the statute of 3 H. 7. cap. 2. of taking of women against their wils, &c.

(6) *Soit attain.*] That is, have judgement in case of felonie for the felonie; for if the principall be convict by verdict, and prayeth his clergie; or if the principall upon his arraignment confesse the felonie, and before judgement obtaine a pardon, the accessarie is thereby discharged, because the principall was never attained, as our statute speaketh; and so it is if the principall die before judgement, or upon his arraignment stand mute. And these cases have been according to this declaratorie act well resolved, wherein there had been great variety of opinions.

The difference between an appeal by bill and by writ.

7 H. 4. 31.

Nota.

Declare before any appearance.

Regula.

8 E. 3. judgm. 225. 3. part of the Instit. Hic cap. 14. fo. 353.

40 aff. 25. 7 H. 4. 30. Pl. com. 99.

Li. 4. fo. 47. Waits case, & fo. 44, 45. Vaux case.

Vaux case, ubi supra.

3 H. 7. cap. 2. 2 E. 3. 27. 5 lib. aff. 5. 13 aff. 14. 22 E. 3. coro. 260. 7 H. 4. 16. 36. 10 H. 4. 5. 11 H. 4. 93. 3 H. 7. 1. 3 H. 7. coron. 53. 4 E. 6. coron. Br. 184. Li. 4. fo. 43, 44. Eyres case, & Bibithes case.

* [184]

2 R. 3. fo. 21,
22.

If the principall be erroneously attainted, yet this erroneous attainder is within this act, for the accessary shall not take advantage of the error, but the principall onely.

7 H. 4. 47.
9 H. 7. 19. b.

And note, that the attainder of the principall must be in the same suit where the accessary is also to be put to answer; and therefore if the principall be attainted of murder at the kings suit, and after the wife bring an appeale against the principall and accessary, the principall plead the former attainder, the accessary shall not be put to answer, and yet the principall is attainted.

40 ass. p. 8.
7 H. 4. 30.
9 H. 4. 2. Li. 9.
fo. 19. Scig.
Zanchars case.

The experience and course at this day is, and warranted by good authority and reason, that if the principall plead not guilty, the accessary shall plead not guilty also, and may be tryed by one inquest; but the charge of the jury is, that if they find the principall not guilty, they shall find the accessary not guilty also; and this is for advancement of justice; for if there were no procurers before, nor any receivers after, there would be fewer principals.

9 H. 7. 19.

50 E. 3. 15, 16.

But if the principall plead not directly to the felonie a plea to bar the plaintife, as *auterfoits attaint*, or *unques accouple*, or the like; there the accessary shall not plead untill that plea be determined: and so if the principall plead a plea to the writ, the accessary shall not be driven to answer untill the plea be determined.

For this word [attaint] and of attainders in deed and in law, see the first part of the Institutes, sect. 747.

(7) *Issint que un mesme ley soit de ceo per tout la terre.*] This is the honour of the law, when all the courts of justice through the whole land, in all cases pronounce the law *tanquam uno ore*, which this branch doth aime at in this particular case, and ought to be observed in all other cases; *lex uno ore emnes alloquitur*.

(8) *Dattacher son appeale al procheine countie.*] That is, to comence his appeale before the coroner at the next countie.

Raft. pl. 42. 47,
48.

(9) *Lexigent de eux demurge, &c.*] So much hath been said may serve for the exposition of this act, the residue shall be handled in the treatise of the pleas of the crowne. See the third part of the Instit. *ubi supra*.

C A P. XV.

ET pur ceo que viscounts, et auters (1), queux cunt prises et retenus en prison gents rettes de felonie (2) [et] meint foits ount lessé per replevin les gents, queux ne sont my replevisables, et ont detenus en prison ceux queux sont replevisables, per encheson de gaign' des uns, et de grever les auters, et par ceo que avant ces heures ne fuit my determine (3) [certainment] queux gentes fussent replevisables (4), et queux non, forspis ceux queux fussent prises (5), pur mort de home (6), ou per commandement le roy (7), ou de les just:ces (8),
ou

AND forasmuch as sheriffs, and other, which have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable, because they would gain of the one party, and grieve the other; and forasmuch as before this time it was not determined which persons were replevisable, and which not, but only those that were taken for the death of man, or by commandment of the king, or of his justices, or for the forest;

ou pur la forest (9): purview est, et per le roy commande, que les prisoners queux sont avant utlages (10), et ceux queux eyent forjure la terre (11), provours (12), et ceux queux sont prises ove mainer (13), et ceux queux oint debruse la prison le roy (14), larons apertment escries et notories (15), et ceux que sont appellez des provours tanque come les provours sont en vie (sils ne soient de bone fame) (16) et ceux queux sont prises pur arson feloniously fait (17), ou pur faux money (18), ou fauxer le seale le roy (19), ou excommenage prise per priver levesque (20), ou pur appiert melveist (21), ou pur treason que touche le roy (22) mesme, ne soient en nul maner replevisables per le common briefe, ne sans briefe (23): mes ceux queux sont endites de larceny (24), per enquests des viscounts, ou des bailifes (25) prises de lour offices, ou per legier suspicion, ou pur petit larceny, que namount ouster le value de xii. deniers, sils ne soient rettes dauter larceny devant cel heure, ou rettes de receiptment des larons, ou des felons, ou de commaundement, ou de la force, ou del aide de le felony fait, ou rettes dauter trespass, pur le quel un ne doit perdre vie ne member, et home appellé de provour puis la mort le provour, sil ne soit apert laron escrie, soit desormes lessé per suffisant plevin, devant le vicont (26), dont le vicont voile respondre (27), et ceo sans rien doner (28) de lour biens pur la plevin. Et si le vicont ou auter lessent per plevin ul, que ne soit replevisable (29), si ceo soit vicunt, constable, ou auter bailife de fee que eit gard de prisons (30), et de ceo soit attainit, perdr' le fee et baillie a tous jours. Et si soit south-vicount (31), constable, ou bailife, ou celui que ad tiel fee pur garder les prisons, et ait ceo fait sans la volunt son seignior, ou auter bailife que ne soit de fee, eit lenprisonment de 3. ans, et soit rent a le volunt le roy. Et si ul detaigne les prisoners replevisables, puis que le prisonr eit offre suffisant suerty,

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forest; it is provided, and by the king commanded, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manour, and those which have broken the king's prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living (if they be not of good name) and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the king's seal, or persons excommunicate, taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise repleviable by the common writ, nor without writ: but such as be indicted of larceny, by enquests taken before sheriffs or bailiffs by their office, or of light suspicion, or for petty larceny that amounteth not above the value of xii d. if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or of commandment, or force, or of aid in felony done; or guilty of some other trespass, for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief, nor defamed) shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods. And if the sheriff, or any other, let any go at large by surety, that is not repleviable, if he be sheriff or constable or any other bailiff of fee, which hath keeping of prisons, and thereof be attainted, he shall lose his fee and office for ever. And if the under-sheriff, constable, or bailiff of such as have fee for keeping of prisons, do it contrary to the will of his lord, or any other bailiff being not of fee, they shall have three-years imprisonment, and make fine at the king's pleasure. And if

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any

il ferra en le greve mercy le roy (32). Et sil prent loure pur luy deliverer (33), il rendra le double au prisoner, et ensemblement ferra en le greve mercy le roy.
De Finibus levatis. 27 E. 1. cap. 13.

any with-hold prisoners replevifable, after that they have offered sufficient surety, he shall pay a grievous amercement to the king; and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall be in the great mercy of the king.

Cap. Itin. Vet. Mag. Char. 155. 27 E. 1. cap. 3. 23 H. 6. cap. 10. Pl. com. 67. (1 Roll, 134. 192. 268. Bro. Mainprise, 11. 56. 78. Fitz. Mainprise, 1. 39. 40. Bro. Mainprise, 54. 57. 59. 60. 75. 78. 91. 11 Rep. 29. Bro. Main. 6. 9. 19. 22. 30. 48. 50. 51. 53. 58. 63. 64. 73. 91. 94. 97. 2 Bulstr. 328. 3 Bulstn. 113. 27 Ed. 1. stat. 1. c. 3. 3 H. 7. c. 3. 1 & 2 Ph. & M. c. 13.)

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Lib. 2. fol. 45.
Marleb. c. 19. 28.

(1) *Viscounts et autres.*] That is to say, sheriffes and gaolers that have custody of gaoles, so as this act extends not to any of the kings justices, or judges of any superiour courts of justice; first, for that they being superiours are not comprehended in the generall words, as often have been observed. 2. *Queux ont prises ou reteynus prisoners*, which judges doe not. 3. Because in those dayes prisoners were commonly bailed by the kings writ *de homine repleg'*, and then also by the writ *de odio et atia*, both which were directed to the sheriffe.

Brit. fol. 34. b.

And here it is proved, that it is an offence as well to baile a man notailable, as to deny a man baile, that ought to be bailed; and the reason is yielded wherefore the sheriffes and others did so offend, because they would gaine of the one, and grieve the other, viz. either for avarice, or for malice.

(2) *Gents rets de felony.*] In those dayes felony comprehended in it as well treason (as in this chapter it appeareth) as homicide, rape, or burglary, robbery, arsons, and all larcenies and thefts; for the word and signification, see the first part of the Institutes, sect. 745.

For the word replevifable, see Marleb. cap. 28. Stamf. Pl. Cor. 72. Regist. 77.

(3) *Avant ces heures ne fuit determine, &c.*] Here is another mischief recited, that it was not certainly determined, what people were replevifable, and what not, within the generall words of the writ *de homine repleg'*, viz. *Pro aliquo alio recto, quare secundum consuetudinem regni non sunt replegiabiles.*

Marlb. ca. 28.
Regist. F. N. B. 249.

(4) *Et queux homes fuer' replevifables.*] This word [replevifable] proveth, that this act intendeth what persons were to be replevied by the common writ *de homine replegiando*, which was directed to the sheriffe under whose custody the prisoners are, and of whom this act speaketh, and so it appeareth by the Register: and replevy, or plevy is applied to the sheriffe to take pledges, and baile to the highest courts of record. And the writ *de manucapione* directed to the sheriffe is grounded upon this act, in which writ not onely *replegiar'* but *manuapere* also is used.

Regist. 77. & 133. Brac. 1. 3. 121. 154. Fleta, lib. 2. cap. 2. Britton, fo 73. H. 43 E. 3. Coram Rege. Rot. 110.

(5) *Forspris ceux queux fuer' prises pur mort de home.*] Here our act first setteth downe what persons were notailable for certain offences by the common writ *de homine repleg'*, and they be in number foure. But by the auncient law of the land in all cases of felony, if the party accused could finde sufficient sureties, he was not to be committed to prison, *quia carcer est mala mansio*; but afterwards it was provided by parliament that in case of homicide

micide the offender was notailable, for so Glanvill saith, *In omnibus autem placitis de feloniam solet accusatus per plegios dimitti, præterquam in placito de homicidio, ubi ad terrorem aliter statutum est.*

(6) *Pur mort de home.*] The death of man is so odious in law, that, (as is above said) by the common writ *de homine repleg'*, neither principall nor accessary was replevifable.

(7) *Per maundement le roy.*] *Per præceptum regis.*

1. ^a The king being a body politique cannot command but by matter of record, for *rex præcipit, et lex præcipit* are all one, for the king must command by matter of record according to the law.

2. ^b When any judicall act is by any act of parliament referred to the king, it is understood to be done in some court of justice according to the law. And the opinion of Gascoine chiefe justice is notable in this point, that the king hath committed all his power judicall to divers courts, some in one court, some in another, &c. And because some courts, as the kings bench, are *coram rege*, and some *coram justiciariis*, therefore the act saith, *per maundement le roy*, and the next words be, *ou de ses justices.*

Hussey chiefe justice reported, that sir John Markham said to king E. 1. that the king could not arrest any man for suspicion of treason, or felony, as any of * his subjects might, because if the king did wrong, the party could not have his action: if the king commaund me to arrest a man, and accordingly I doe arrest him, he shal have his action of false imprisonment against me, albeit he was in the kings presence; resolved by the whole court in 16 H. 6. which authority might be a good warrant for Markham to deliver his said opinion to E. 4.

The words of the statute of 1 R. 2. cap. 12. are, *Si non que il soit per briefe ou autre maundement le roy*; and it was resolved by all the judges of England, that the king cannot doe it by any commandement, but by writ, or by order, or rule of some of his courts of justice, where the cause dependeth, according to law.

Dominus rex de aliquo contemptu sibi illato, alium judicem in regno, quam in curia sua, habere non debet. Vide Marleb. cap. 1.

And Fortescue speaking to the prince to instruct him against he should be king, saith, *Melius enim per alios, quam per teipsum judicia reddes, quo, proprio ore nullus regum Angliæ usus est, et tamen sua sunt omnia judicia regni, licet per alios ipsa reddantur, sicut et judicium olim sententias Josaphat asseruit esse judicia Dei.*

And Bracton saith, *Nihil aliud potest rex, &c. quam quod de jure potest.*

So as, *maundement le roy* is as much as to say (as some asseme) as by the kings court of justice; * for all matters of judicature, and proceedings in law are distributed to the courts of justice, and the king doth judge by his justices, 8 H. 4. fol. 19. & 24 H. 8. cap. 12. and regularly no man ought to be attached by his body, but either by proces of law, that is (as hath beene said) by the kings writs, or by indictment, or lawfull warrant, as by many acts of parliament is manifestly enacted and declared, which are but expositions of *Magna Charta*; and all statutes made contrary to *Magna Charta*, which is *lex terræ*, from the making thereof untill 42 E. 3. are declared and enacted to be void, and therefore if this act of W. 1. concerning the extrajudicall commandement of the king be against *Magna Charta*, it is void, and all resolutions of

Glanv. l. 14. c.

1. 3.

Bract. l. 1. 3. fo. 123.

25 E. 3. 42.

28 E. 3. 94.

40 E. 3. 42.

44 E. 3. 38.

43 E. 3. 17.

29 Aff. 44. 37.

12. 43 Aff. 49.

41 Aff. 14.

7 H. 4. 27.

21 E. 4. 84.

F.N.B. 250. b.

^a Pl. Com. 234.

Seign. Berkleyes

case, & 217. le

Duchy case.

Stamf. Pl. Cor.

72. 73.

^b See before c. 4.

2 R. 3. fol. 11.

1 H. 7. 4. See

hereafter at this

mark †.

Pasch. 18 E. 3.

Coram Rege.

Rot. 33. Jo. de

Bildeston's case.

optime. 16 H. 6.

tit. Monfrans

des faits 182.

Stamf. Pl. Cor.

72. e. Dier 4.

& 5. Ph. & Mar.

162. b. 10 Eliz.

275. Mich. 12

& 13 Eliz. 297.

Tr. 21 E. 3.

Norf. Coram

Rege. Rot. 170.

Marlb. cap. 1.

Fortesc. cap. 8.

* [187]

Mag. Char.

c. 29. 5 E. 3. c. 9

28 E. 3. ca. 3.

38 E. 3. ca. 9.

42 E. 3. c. 3.

2 E. 3. fo. 2 & 3.

See Mag. Chart.

ca. 29. verb. per

legem terræ.

* 8 H. 4. 19

Gasc. & 24 H.

8. ca. 12.

42 E. 3. ca. 1.

judges concerning the commandement of the king are to be understood of judicial proceeding.

Britton, fo. 73.
2 R. 3. 11.

(8) *Ou de les justices.*] Upon any cause, whereof they are judges, appearing to them.

1 E. 3. ca. 9.

(9) *Ou pur la forest.*] And all these foure are particularly excepted out of the common writ *de homine replegiando*, that the sheriffe in his county court, which is not a court of record, shall not replevy any of these foure that are committed; for example, though the party be committed by the personall commandement of the king, albeit the commitment be unlawfull, yet the sheriffe shall not deal therein by the writ *de homine replegiando*, but the superiour courts at Westm. upon a *habeas corpus*, &c. shall doe justice to the party in all those foure causes; so as Stamford, being well considered, impugneth not in any sort this opinion, for his opinion extendeth only to the county court upon the writ *de homine replegiando*, and not to the superiour courts.

But since we had written thus much, and passed over; see the Petition of Right, *anno 3 Caroli regis*, resolved by the king, the lords spiritaall, and temporall, and the commons in full parliament.

Now this act doth provide, that these prisoners hereafter following shall not be replevisable neither by the common writ (that is the writ *de homine repleg'*, nor *ex officio* (without writ) by the sheriffe or other gaoler, and they be 13 in number, and all these 13 are excepted out of the said common writ by the said generall words, *viz. Vel pro aliquo alio recto, quare secundum consuetudinem regni non sunt replegiabiles.*

Braet. l. 3. 154.
2 Eliz. Dier 179.

15 H. 7. 9.
Britton, fol. 73.

* [188]

(10) 1. *Persons utlages.*] Persons outlawed are attainted in law, and therefore * are not replevisable or to be bailed: for if a man be arraigned of homicide, and plead not-guilty, and is found guilty, and for difficulty of clergy is reprieved, it was resolved by the justices, that he was notailable, for the intendment of the law in bails is, *Quod stat indifferenter*, whether he be guilty or no; but when he is convict by verdict or confession, then he must be deemed in law to be guilty of the felony, and therefore notailable at all, *a fortiori*, when the party is attainted in law.

Braet. l. 3. 121.
b.

5 H. 7. 14.
9 H. 6. fo. 2.

And herewith agreeth Braeton, *Nec sunt illi qui culpabiles inveniuntur, per plegios dimittendi*, &c. And yet if the party upon the *cap. utlag'* plead misnomer, or alledge error, &c. he may be bailed.

(11) 2. *Queux eient forjure.*] They be also attainted upon their owne confession, and therefore notailable at all by law.

Brac. l. 3. fo.
153. b.

(12) 3. *Provours.*] The reason wherefore provours or approvors be notailable is, for provours doe first confesse the felony to be done by themselves, and therefore they are notailable, because it appeareth that they be guilty of the fact.

Braet. li. 3. fo.
154.

Brit. fo. 22. b.
& 72. b.

(13) 4. *Ceux queux sont prises ove le mainer.*] For in this case *non stat indifferenter*, as hath been said, whether he be guilty or no, being taken with the mainer, that is with the thing stolne, as it were in his hand, aunciently called handhabbend; the like is aunciently called backberend, as a bundle or fardle at his back, which Bracton useth for manifest theft, *furtum manifestum*, and so doth Britton.

Braet. l. 3. 153.
b.

(14) 5. *Ceux queux ont debruse la prison le roy.*] Here be two offences: 1. His breaking of the prison; for it is presumed, that he

he that is innocent will never break prison: and 2. his flying
Quia fatetur facinus, qui iudicium fugit.

(15) 6. *Larons apertement esries et notories.*] Felons openly known and notorious are not bailable. 16 E. 4. 5.

(16) 7. *Ceux queux sont appellees des provours tanque come les provours sont en vie (s'ilz ne soient de bone fame.)*] The appeale of the approver is forcible against the appellee, because the approver confesseth himselfe guilty of the same felony, and therefore it serveth in nature of an indictment against the appellee, so long as the approver liveth, unlessse the appellee be of good fame. But yet the generall words doe receive qualification, for albeit the prover be alive, yet if the approver waive his appeale, the appellee shall bee bailed, if no other appeale bee against him. 25 E. 3. 42.

(17) 8. *Ceux queux sont prises pur arson, feloniously fait.*] Burning of houses, &c. was felony by the common law, as it appeareth by this act, and by our ancient authors, viz. Glanvill, the Mirror, Bracton, Britton: and Fleta saith, *Si quis ædes alienas nequiter et ob inimicitiam vel prædæ causa tempore pacis combusserit, et inde convictus fuerit, &c. capitali debet sententia puniri.* And this seemeth to be the law before the conquest: *Incendiaris capitis pena esto.* And againe, *Sanè quidem teñtorum excisiones et incendia, apertæ compilationes, cædes manifestæ, dominorumque proditores scelera sunt jure humano inexpiabilia.*

(18) 9 *Ou pur faux money.*] This appeares to be treason by the common law. Glanvill, lib. 14. cap. 7. Bracton, lib. 3. fo. 118. Britton, fol. 16. Fleta, lib. 1. cap. 22. Mirror, cap. 6.

Præterea autem statuimus, ut unus per omnem ditionem nostram atque idem sit nummus, eumque nemo extra oppidum cudito, atqui si monetariorum quisq; nummos corruperit, ei manus scelere violata præciditor. See the third part of the Institutes, in the exposition upon the statute of 25 E. 3. c. 1. of Treason.

(19) 10. *Ou fauxer le seale le roy.*] This was also treason by the common law, as it appeareth by the said ancient authors.

And both these were declared to be high treason at the common law, by the statute of 25 E. 3. cap. 1. See more hereof in the third part of the Instit. ubi supra.

(20) 11. *Ou excommenge prise per prier del ewesque.*] That is, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the kings writ of *excommunicato capiendo* (which is so called of words in the writ called a *Significavit*) is not baileable, for in ancient time men were excommunicated but for heresies, *propter lepram animæ*, or other hainous causes of ecclesiasticall conufance, and not for small or petie causes; and therefore in those cases the partie was not baileable by the sheriffe, or gaoler without the kings writ: but if the party offered sufficient caution *de parendo mandatis ecclesiæ in forma juris*, then should the party have the kings writ to the bishop to accept his caution, and to cause him to be delivered. And if the bishop will not send to the sheriffe to deliver him, then shall he have a writ out of the chancery to the sheriffe for his delivery: or if he be excommunicated for a temporall cause, or for a matter whereof the ecclesiasticall court hath no conufance, he shall be delivered by the kings writ without any satisfaction.

(21) 12. *Ou pur apert mal-veisl.*] Or for open or manifest offences.

Lib. 11. fo. 296
Alex. Powtlers
case.
Glanv. li. 14. &
1. cap. 2.
Mirror, ca. 1.
§ 8.
De Ardours.
Bract. l. 3. fo.
118.
Brit. fo. 16. 39.
Fleta, li. 1. c. 35-
10 E. 4. 14.
11 H. 7. 1.
a Inter leges
Ethelstani.

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b Int' leges Can-
nuti.
Int. leges Ethel-
stani regis.

Bract. l. 5. f. 408,
409. Flet. li. 6.
cap. 44. Regist.
F.N.B. 63. &c.
Doct. & Stud.
li. 2. cap. 32.

fences. For, as hath beene said, baile is *quando stat indifferenter*, and not when the offence is open and manifest.

Brit. fo. 73.

(22) 13. *Ou pur treason que touche le roy.*] Britton, who wrote after this statute, saith, *Queux son replevisables, et queux non, avons dit in nous statutes. Et ouster ceo ne sont my replevisables endites ou appeales de compassement de nostre mort, sicome desuis est dit, ne ceux que sont prises per judgement de nous justices, &c.*

Glanv. li. 14. c. 1.
& 3. 40 aff. p. 33.

For by the common law a man accused or indicted of high treason, or of any felonie whatsoever, was bayleable upon good surety; for at the common law the gaole was his pledge or surety that could find none. And this appeareth by Glanvill, who saith, *Is qui accusatur, ut prædiximus, per plegios salvos et securos solet attachiari, aut si plegios non habuerit, in carcerem detrudi*: so as a man by the common law was baileable for any offence, untill he were convicted: and this seemeth to be the old law of the land before the conquest, viz. *Ingenuus quisque fidejussores, qui enim (si quando in crimen vocetur (jus suum cuique tribuere quam paratissimum fore præstent, fidissimos adhibeto.*

Int. leges Ethel-
red. regis.

(23) *Ne soient in nul manner replevisables per le common brieve, ne sauns brieve.*] That is, the sheriffe shall not replevie them by the common writ *de homine replegiando*, nor without writ, that is, *ex officio*: but all or any of these may be bailed in the kings bench, &c.

(24) *Mes ceux queux sont endites de larcenie.*] *Latrocinium, larcin-ium, i. furtum*, theft: and this act divideth larcenie into two kinds: sc. grand and petit; grand larcenie is when the thing stolne is above the value of xii. d. *ouster le value de xii. d.* as our act speaketh: and petit larcenie is when it is of the value of xii. d. or under. And the things stolne are to be reasonably valued, for the ounce of silver at the making of this act was at the value of xx. d. and now it is of the value of v. s. and above.

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Regist. 269.
Flet. li. 1. c. 36.
Braft. lib. 3. fo.
150, 151.
Britt. fo. 22. 45.
Fortescue ca. 46.
8 E. 2. coro. 404,
406. 415. 18 aff.
14. 22 aff. p. 39.
Tr. 21 E. 3. Co-
ram rege Rot. 42.
10 E. 4. 14.

Est enim furtum de re magna, et re parva: pro minimo tamen latrocinio 12. denariorum, et infra, nullus morte condemnatur, &c. ex pluralitate tamen et cumulo modicorum delictorum poterit capitalis sententia generari: And this is good law at this day, and approved by many authorities.

(25) *Per enquestes des viscounts ou des bailiffes, &c.*] That is, of sheriffes in their tournes, or lords in their leets, or those that have infangthiefe and outfangthiefe, &c.

Here our act setteth downe seven kinds of offenders that may be bailed.

Regist. 83. 268.

1. Persons indicted of larceny before the sheriffe, &c. yet this is so expounded by the Register, that they be of good fame.

2. Imprisoned for light suspicion. Here is added also, *dum tamen bonæ famæ sunt*.

3. For petit larceny, which doth not amount above the value of xii. d. if they be not charged with other larceny.

Regist ubi sup.
F.N.B. 249,
250.

4. Accused for the receiving of thieves or felons.

5. Or of commandement, force, or aid of the felonie done.

6. Or accused for other trespassse, for which a man ought not to lose life or member.

Regist. ubi sup.
F.N.B. ubi sup.

7. Or the appellee of an approver after the death of the approver; and upon our act is the writ *de manucaptione* grounded, which maketh mention thereof.

(26) *Soit*

(26) *Soit desormes lessé per suffisant-plevin devant le viscount.]* That is to be understood where the indictment was taken before the sheriffe in his tourne, for there he was judge of the cause, for other prisoners could not be bayle without writ: and if the sheriffe having sufficient surety offered unto him, refused to bayle him, he should have a writ *de manucaptione* directed to the sheriffe to take pledges of him; and if the bailiffe of a hundred (which is intended of a steward in a leet) refused to take pledges of one indicted before him, the prisoner should have had a writ *de manucaptione* to the sheriffe to take pledges of him; and all this appeareth by the writ *de manucaptione*. But since this time (to speak once for all) this writ of *manucaptione* is taken away by the statute of 28 E. 3.

Braet. li. 3. fo.
154.
Regist. 83. 268.
291. F.N.B.
249, 250.
F.N.B. ubi sup.

The statute of 1 & 2 Phil. & Mar. concerning baylement by justices of peace, hath relation to our act, which hath made me the longer in explaining hereof. And see the statute of 2 & 3 Phil. & Mar. concerning that matter.

1 & 2 Ph. & M.
c. 13. 2 & 3
P. & M. ca. 10.

(27) *Per suffisant plevin dont le viscount voille responder.]* They which take pledges, ought to take sufficient pledges, for which they will answer.

Vide ca. 10. &
26.

(28) *Et ceo sans riens donner.]* For neither the sheriffe, nor other of the kings officers could take any thing for doing his office. *Vide cap. 26.*

(29) *Et si le viscount ou auter lessent per plevin ul que ne soit plevisable.]* Ou auter. This is expounded by the words following.

(30) *Si ceo soit viscount, constable, ou auter bailife de fee que eit gard de prisoners.]* So as at this time there were sheriffewickes in fee, and constables and bailiwicks in fee, which had the keeping of prisons: these being attainted of letting to baile of any prisoner not baileable, should lose the fee and bayliwicke for ever: and upon office found, the king should have the inheritance of the office in him to be grantable over.

(31) *Et si soit seuth viscount, &c.]* Here it appeareth, that under-sheriffes are of greater antiquity, then some have surmised.

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Note, the act of the under-sheriffe or other under baylie without the assent of his superiour is no forfeiture of the fee, or bayliwick of his superiour, though in many other cases the superiour shall answer for his deputie.

(32) *Et sil deteine les prisoners replevisables puis que le prisoner eit offre suffisant suretie, il serra en le greve mercy le roy.]* Here it appeareth, that to deny a man plevin that is plevisable, and thereby to detain him in prison, is a great offence, and grievously to be punished.

39 H. 6. 32.
For this see the
stat. of 26 E. 1.
intituled, *Contra
Vic' & Clericos.*
Vet. Mag. Chart.
159, 160.
Vet. N.B. fo.
40.

(33) *Et si il prist louer pur luy deliverer.]* And if the sheriffe, &c. take any reward for his deliverance, the party shall recover double the value, and also he shall be in the great mercy of the king. *Vide cap. 26.*

There be many statutes made since our act, that doe prohibite baile or mainprise in very many cases, and alloweth the same in many other, which tend not to the exposition of our act, and doe belong to another treatise, and therefore we omit to speak of them any farther in this place.

See the statute of 1 E. 4. cap. 2. that upon all presentments and indictments taken before any sheriffe or other in their tournes,

2 E. 4. ca. 2.

lects,

leets, or law-dayes, they shall have no power to attach, arrest, or put in prison any person so presented or indicted, but that the sheriffe shall deliver all such presentments and indictments to the justices of peace at their next sessions.

CAP. XVI.

EN droit de ceo que ascun gents par-nount, et prendre fount les avers des auters, et les chasent hors del countie ou les avers fueront prises: purview est, que nul desormes ne le face. Et si ul le face, soit grevement rente solonque ceo que est contenue en les estatutes de Marleb. cap. 4. faits en temps le roy H. pier le roy que ore est. Et per mesme le maner soit faits de ceux, queux parnont les avers a tort, et queux font distres en auter fee, plus grevement soient punies, si le maner de trespas le demaund.

IN right thereof, that some persons take, and cause to be taken, the beasts of other, chasing them out of the shire where the beasts were taken; it is provided also, that none from henceforth do so; and if any do, he shall make a grievous fine, as is contained in the statute of Marlebridge, made in the time of king Henry, father to the king that now is. And likewise it shall be done to them which take beasts wrongfully, and distrain out of their fee, and shall be more grievously punished, if the manner of the trespass do so require.

Vide Flet. lib. 2. c. 40. 30 ass. 28. (1 H. 5. 3. 7 H. 7. f. 1. 52 H. 3. c. 4. 1 & 2 Ph. & M. c. 12. Regist. 183.)

This statute consisteth upon two branches: the first is a confirmation of the statute of Marlebridge, cap. 4. and the second branch is a confirmation of the statute of Marlebridge, cap. 2. & 15. where you may reade the exposition of them: Onely these differences I observe betweene them, that Marlebridge, ca. 4. speaketh onely of distresses, and our act speaketh of all manner of takings. Marlebridge prohibiteth distresses generally; our act, of beasts, and goeth no farther. Marlebridge speaketh of distresses which he hath taken; our act which he hath taken, or caused to be taken. Marlebridge, cap. 15. excepteth the king and his ministers, &c. which our act doth not, but yet by construction of law they are excepted, because the king might doe it by his prerogative.

This act Fleta reciteth in this manner: *Provisum est quod nullus averia aliena capiens per se, vel per suos notos vel ignotos extra com', in quo capta fuerint, fugare præsumat, &c.*

Vide Cap. Itin.
Vet. Mag. Char.
fo. 155.

13 E. 4. 6.

Fleta ubi sup.

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C A P. XVII.

PURVIEW est ensement, que si ul desormes preigne les avers des auters, ei les face chasc en chastell, ou en forcelet (1), et illoques dedeins le close du chastell, ou de forcelet les de-teign' encounter gage et pledge, pur que les avers ferreront solempnement demandes per visc', ou per auter bailife le roy a la suit del pl', le visc' ou le bailife prise ove luy poyar de son countie (2), ou de sa bail', et voile assaier de faire de ceo rep' (3) des avers a celuy que les aver' prise, ou a son seignour, ou as auters des homes son seignour quicunque queux sont troves en le lieu, ou les avers fueront enchases. Et si home luy desforce adonques de la deliverance des avers, ou quel ne trouve home pur le seignour, ou pur celuy que les aver' prise que respoin' et face le deliverance, apres ceo que le seignour, ou parnour, per visc' ou per bailife, serra admonist de faire la deliverance, si soit en pays, ou pres, ou la ou il purra per le parnour, ou per auters des fees convenablement estre garnie de faire le deliverance, sil fuit hors de cel pays quant le prise fuit fait, et ne face adonques maintenant les avers deliver, que le roy pur le trespass et pur le despite, face abate le chastell, ou le forcelet sans recoverie (4): et tous les damages que le plaintife avera rescieve de ses avers, ou de son gainage disturbe (5), ou en auter maner puis le primer demand des avers fait per le vic', ou per le bailife, luy soient restores au double, de seignour ou de celuy que les avers aver' prise, sil eit de quoy, et sil neit de quoy, respoin' le seignour quel heure, et en quel maner deliverance soit fait apres ceo que le vicount ou le bailife serra venue pur la deliverance faire. Et soit ascavoir, que la ou le vic' dever' faire returne del brieve le roy ou bailife le seignour du chastell, ou le forcelet,

ou

IT is provided also, that if any from henceforth take the beasts of other, and cause them to be driven into a castle or fortrefs, and there within the close of such castle or fortrefs do withhold them against gage and pledges, whereupon the beasts be solemnly demanded by the sheriff, or by some other bailiff of the king's; at the suit of the plaintiff, the sheriff or bailiff, taking with him the power of the shire or bailiwick, do assay to make replevin of the beasts from him that took them, or from his lord, or from other, being servants of the lord (whatsoever they be) that are found in the place whereunto the beasts were chased; if any desforce him of the deliverance of the beasts, or that no man be found for the lord, or for him that took them, for to answer and make the deliverance, after such time as the lord or taker shall be admonished to make deliverance by the sheriff or bailiff, if he be in the countrey, or near, or there whereas he may be conveniently warned by the taker, or by any other of his to make deliverance; if he were out of the countrey when the taking was, and did not cause the beasts to be delivered incontinent, that the king, for the trespass and despite, shall cause the said castle or fortrefs to be beaten down without recovery; and all the damages that the plaintiff hath sustained in his beasts, or in his gainure, or any otherwise (after the first demand made by the sheriff or bailiff) of the beasts, shall be restored to him double by the lord, or by him that took the beasts, if he have whereof; and if he have not whereof, he shall have it of the lord, at what time, or in what manner the deliverance be made, after that the sheriffe or bailiff shall come

ou a auter a que returne de brieſe le roy appent, ſi le bailife de cel franchise ne face le delivrance, puis que le vicount aver' le return' a luy fait, face le vicount ſon office ſans delay (6), et ſur lavantdit peine. Et per meſme le maner ſoit fait la delivrance * per attachment de pleint fait ſans brieſe, et ſur meſme la peine (7). Et ceo face a entendre per tout la, ou le brieſe le roy court. Et ſi ceo ſoit en le marche de Gales (8), ou aïlors, la ou le brieſe le roy ne court nye, le roy que eſt ſoveraigne ſeignior ent fra droit (9) a ceux queux pleindre ſe voudront.

* [193]

come to make deliverance; and it is to wit, that where the ſheriff ought to return the king's writ to the bailiff of the lord of the caſtle or fortrefs, or to any other, to whom the return belongeth, if the bailiff of the franchise will not make deliverance after that the ſheriff hath made his return unto him, then ſhall the ſheriff do his office without further delay, and upon the foreſaid pains: and in like manner deliverance ſhall be made by attachment of plaint made without writ, and upon the ſame pain. And this is to be intended in all places where the king's writ lieth. And if that be done in the marches of Wales, or in any other place where the king's writs be not current, the king, which is ſovereign lord over all, ſhall do right there unto ſuch as will complain.

(52 H. 3. c. 3. 13 Ed. 1. ſtat. 1. c. 39. Regiſt. 85. 52 H. 3. c. 21.)

Vide Marlb.

52 H. 3. ca. 1.

The miſchiefe before this act was, that in the irregular time of H. 3. great men, when they took a diſtreſſe of the beaſts of their tenants or neighbours, that ſerved for their tillage or huſbandry, to prevent the ſpeedy courſe of juſtice, and to enforce the owners of the beaſts for neceſſity to yeeld to their deſire, would drive the beaſts into a caſtle or fortrefſe, and there detain and keepe them againſt gages and pledges, ſo as no replevy could be made according to the ordinary courſe of law; for that in caſe of a ſubject he could not break the caſtle or fortrefſe, but the ſheriffe was to reſtore *averia elongata*, and thereupon the owner was to loſe the uſe of his beaſts of long time. But this act giveth remedy, that the ſheriffe taking with him the power of the county may make replevin, as by the body of the act appeareth.

Vide 52 H. 3. c. 3.

Bretton, 54. b.

Fleta, li. 2. c. 40.

W. 2. ca. 39.

lib. 5. fo. 91. 92.

Semaines cale.

Ver. N B. 43. 44.

Regiſt. 83. 85.

8 H. 4.

17. in Repl.

(1) *Chafé in caſtel ou en forcelet.*] And ſo it is, if he that diſtrain chaſe the diſtreſſe into any other houſe, park, or other place of ſtrength, the ſheriffe to make replevin may by force of this act break the houſe, caſtle, or fortrefſe, park, or other place of ſtrength by force of this act, at the ſuite of a ſubject.

(2) *Pur que les avers ſerront ſolempnement demandes per viſcount, ou auier bailife le roy a la ſute del plaintiſe, le viſcount ou le bailife priſe oue luy poyar de ſon county, &c.*] Nota, every man is bound by the common law to aſſiſt not only the ſheriffe in his office for the execution of the king's writs (which are the commandements of the king) according to law; but alſo his bailly, that hath the ſheriffes warrant in that behalfe, hath the ſame authority, which his maſter the ſheriffe hath, for the ſheriffe cannot doe all himſelfe, and if they doe it not being required, they ſhall be fined and imprifoned; but this is ſo to be underſtood, where the ſheriffe may lawfully do it, and that before the ſheriffe doth uſe any force, he ought (as

our

our act teacheth) to demand according to the law the goods to be delivered, so as replevy might be thereof made, for *sequi debet potentia mandatum legis, non præcedere*, force ought to follow, and not to precede the commandement of the law.

Bracton who wrote before this act saith, *Et si [vicecomes] aliquem invenerit resistentem, assumptis secum (si opus fuerit) militibus et liberis hominibus de com' ad sufficientiam capiat corpora hominum resistentium, et illos in prisona salvo custodiat, donec dominus rex inde præceperit voluntatem suam, &c.*

Bract. li. 5. 442.
b.
Fleta, li. 2. c. 62.

And our statutes of W. 1. W. 2. and Marlebridge are all in affirmation of the common law in that point, saving for breaking of the castle, fortresse, house, &c. in case of the subject; in which case our act giveth remedy.

W. 1. c. 9. & 17.
W. 2. ca. 29.
Marlb. ca. 21.
Semaines case.
ubi supra.
3 H. 7. 2. 10.
12 H. 7. 17. b.

If any man, how great soever, might have resisted the sheriffe in executing of the kings writs, then had it been a good retourn for the sheriffe to have retourned such resistance, but as the statute of W. 2. saith, *Quod hujusmodi responsio multum redundat in dedecus domini regis et coronæ suæ*; and that which is in *dedecus domini regis*, &c. is against the common law, therefore of necessity, if need be, for the due execution of the kings writs, the sheriffe may by the common law take *posse comitatus* to suppress such unlawfull force, and resistance.

W. 2. ca. 39.

R. did graunt and render lands by fine to I. I. sued the kings writ to the sheriffe to deliver seisin, the sheriffe retourned, that he could not execute the kings writ for resistance of B. and others unknown; and because the sheriffe tooke not the power of the county in aid of the execution, as the statute willeth, he was amerced at xx. marks, and an attachment awarded against B. and the rest, &c.

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19 E. 2. tit.
Execution 24.

And it is holden for a maxime of law, that it is not lawfull for any man to disturb the ministers of the king in the due execution of the kings writs, or proceffe of law.

8 E. 2. tit.
Execution 252.

Now besides the warrant of the common law, the sheriffe hath his letters patents of assistance, whereby the king commandeth, that all arch-bishops, bishops, dukes, earles, barons, knights, free-men, and all other of that county be to the sheriffe thereof in *omnibus quæ ad officium illud pertinent, intendentes, auxiliantes, et respondentes*; so as no man ecclesiasticall or temporall is exempted from this service being above 15. and under 70. for so it is by construction of law.

(3) *Et voille assaier de faire plevin.*] By force of this clause he ought by the power of the county to make replevin, and it is no retourn for him to say, that the beasts be in a castle, &c. whereof you shall reade more hereafter in this chapter.

Fleta, li. 2. c. 40.

(4) *Que le roy pur le trespassse & pur le disperte face abater le castel ou le forcelet sans recovery.*] But this totall prostrating or demolishing of the castle, &c. cannot be done upon the retourn of the sheriffe, but upon a suit on the kings behalf, wherein the parties interested may be called to answer, and upon judgement given against them proceffe to be made to the sheriffe to prostrate and demolish the castle and fortresse, and so is the book that speaks thereof to be intended.

Semaines case.
ubi sup. fo. 93. a.

(5) *De ses avers, ou son gainage disturbe.*] For the law doth ever favour tillage, and the husbandry of the realme, as by this clause

clause appeareth, and therefore gives the party grieved double damages.

(6) *Et soit assavoir, que la ou le viscount dever' faire retourne del brieife le roy au bailife, le seignior del castel, ou de forcelet, ou a auter a que retourne del brieife le roy appent, si le bailife del franchise ne fait deliverance, &c. face le viscount son office sans delay.*] This doth give some light to the former branch, that if the beasts be detained in a castle or fortresse, the sheriffe must doe his office without delay, that is, forthwith to replevy the beasts; and if he ought to doe it in this case of the franchise, the same he ought to doe in the other case.

Regist. 83.

It appeareth by the Register, that if the constable of the castle upon a mandat to him to make replevin, *nihil inde curavit*, or if he make no retourne, &c. at all, upon retourne hereof, a *non omittas* shall be awarded, &c. But such retournes were permitted before this act, but now by this act the sheriffe in that case ought presently to enter, and make deliverance of the beasts.

F.N.B. 68.

47 E. 3. 33.

Marleb. ca. 21.

(7) *Et per mesme le manner soit fait la deliverance per attachment de pleint fait sans brieife & sur mesme la paine.*] See the statute of Marlebridge that provideth to the same effect, where you shall reade more of this matter.

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18 E. 2. Aff. 382.

1 E. 3. 14. 3 E.

3. 82. 8 E. 3.

427. 13 E. 3.

Jurisdic. 23.

15 E. 3. ib. 24.

24 E. 3. 42.

47 E. 3. 6. 50 E.

3. 26. 6 H. 4. 9.

6 H. 5. Juris-

diction 34.

35 H. 6. 30.

(8) *Et si ceo soit en le marches de Gales.*] The marches of Wales were the commots, great seigniories, and baronies in Wales, which were holden of the king in chiefe, and out of every county of England: if any distresse were driven into a castle or fortresse in the marches of Wales, and detained, a writ should be directed to the sheriffe of the county of England next adjoyning to the castle, or fortresse, where the beasts be so detained, to make replevy.

(9) *Le roy que est souveraigne seignior ent fra droit.*] At this time, viz. in 3 E. 1. Lluellen was a prince, or king of Wales, who held the same of the king of England as his superiour lord, and ought him liege, homage, and fealty; and this is proved by our act, viz. that the king of England was *superior dominus*, i. sovereign lord of the kingdome or principality of Wales.

Polydor Virg.
37 H. 3. p. 306.
Pl. Com. 126. b.
Camden in
Flintih. p. 525.

King H. 3. after prince Edward had married Elianor daughter of Spaine, perceiving him (to use the words of mine author) *Ita suapte natura tanta indole præditum, ut maturius ad res gerendas idoneum redderet, primo Walliæ principatu donavit, deinde Aquitanie et Hibernie præposuit; hinc natum, ut deinceps unusquisque rex, qui secutus est, filium majorem natu principem Walliæ facere consueverit.*

Lluellen prince of Wales, by the incitation of David his brother, in the 9 year of E. 1. rebelled against their sovereign lord; in which rebellion Lluellen was slain, and the king brought all Wales under his subjection: the said David being brother and heire of Lluellen for his rebellion and treason against his sovereign lord was after the death of his brother at a parliament holden in the 11 yeare of E. 1. attainted of high treason; of whose judgement and execution heare what Fleta saith, *Et unico malefactori plura poterunt infligi tormenta, prout meruerit, sicut contigit de Davide principe Walliæ cum per recordum quinque judiciis mortalibus torquebatur, suis namque meritis exigentibus, detractus, suspensus, decollatus, dismembratus fuit et combustus, cujus caput principali civitati, quatuorque quarteria ad quatuor partes regni in odium traditorum deferbantur suspendenda.* By reason whereof, where Wales was before holden of the king, as of his sovereign lord, as is aforesaid,

Rot. Parl. anno

11 E. 1.

Fleta, li. 1. c. 16.

aforesaid, now king Edw. 1. became king of the same in possession, which appeareth by the statute of Snowdon in these words; *Edwardus Dei gratia, &c. divina providentia (quæ in sua dispositione non fallitur) inter alia suæ dispensationis munera, quibus nos et regnum nostrum Angliæ decorari dignata est, terram Walliæ cum incolis suis prius nobis jure feodali subiectam, jam sui gratia in proprietatis nostræ dominium, obstaculis quibuscunque cessantibus, totaliter et cum integritate convertit, et coronæ regni prædicti tanquā partem corporis ejusdem annexuit et univit*: by which act it further appeareth, that king E. 1. had considered, and perused all the laws of Wales, and some of them hee utterly abrogated, some of them hee permitted, some hee corrected, and some he newly added to the others.

Rot. Parliam.
anno 12 E. 1.
Pl. Com. 126.
that this is a
statute.

We have been, above our usuall manner, the more copious herein, because our desire is, that truth might prevaile. See the statutes of 27 H. 8. and 34 and 35 H. 8. concerning Wales: See the fourth part of the Institutes, cap. Of the Courts, &c. of Wales.

27 H. 8. ca. 26.
34 & 35 H. 8.

CAP. XVIII.

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PUR ceo que la common fine et amerciement (1) de tout le county en eyre des justices pur faux judgements (3), ou pur auter trespas, est assesse (2) per vicount et barretors (4) des counties malement, issint que la somme est meintfoits encrue, et les parcells auterment assesse que estre ne duissent, au damage du people, et plusors foits sont poies as vicounts et barretors, que ne poient les acquiteint. Purview est, et voit le roy, que desormes en eyre des justices devant eux devant leur departure soit tiel somme assesse per serement de chivalers et des probes homes, sur tous ceux que escoter deveront (5), et les justices facent mitter les parcells en leur estreats que ils liverent al eschequer (6), et non pas la somme totali (7).

FORASMUCH as the common fine and amerciement of the whole county in eyre of the justices for false judgements, or for other trespasss, is unjustly assessed by sheriffs and barretors in the shires, so that the sum is many times increased, and the parcells otherwise assessed than they ought to be, to the damage of the people, which be manytimes paid to the sheriffs and barretors, which do not acquit the payers; it is provided, and the king wille, that from henceforth such sums shall be assessed before the justices in eyre, afore their departure, by the oath of knights and other honest men, upon all such as ought to pay; and the justices shall cause the parcells to be put into their estreats, which shall be delivered up unto the exchequer, and not the whole sum.

(8 Rep. 39.)

There were foure mischiefs, or rather grievances before this act.

I. That this common fine and amerciement before justices in eyre was promiscuously assessed by the sheriffe and barretors of the county (for so our act speaketh) upon the faultlesse, as well as

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upon

upon the faulty, and that after the justices in eyre were departed and gone.

2. That the same was many times by them increased.

3. That the parcells were otherwise, then they ought to be, to the damage of the people.

4. That the said amerciament was paid to the sheriffe, and barretors, that could not acquite them, and therefore were often doubly charged.

The remedy by the body of the act consisteth on two parts.

1. That such summes shall be assessed by the oath of knights, and other honest men before the justices in eyre, upon such as ought to pay the same.

2. That the justices shall cause the parcels to be put in their estreats, which shall be delivered up in the exchequer, and not the whole summe.

Lib. 8. fo. 39.
Greiffies case.

(1) *Common fine et amerciament.*] Here fine and amerciament are all one, for, as by this act appeareth, it ought to be afferred, which a fine in his proper sense ought not: this is parcel of the green wax, so called, because the estreats to the sheriffe for levying of them are sealed with green waxe.

42 E. 3. ca. 9.
7 H. 4. ca. 3.

This comon amerciament was a great grievance to the people, for that the faultfesse, as well as the faulty, were (as hath been said) thereby charged; and this was *disperdere innocentem cum delinquente*, much like the abuse of the clark of the market, who used to take a common fine, untill it was remedied by act of parliament.

Greiffies case.
ubi supra.
9 Eliz. Dier 263.

(2) *Est affise.*] That is, is afferred.

(3) *Pur faux judgements.*] The suitors in a base court for false judgements shall be amerced, to the end they may be the more wary, and take better advice to doe justice.

Li. 8. fo. 36, 37.
First part of the
Inst. sect. 701.

(4) *Per barretors.*] For the signification of this word, see Pasch. 30 Eliz. the case of barretry, and the first part of the Institutes.

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Mirr. li. 4. § de
amerciaments
leviable.

See hereafter
cap. 45.

(5) *Sur tous ceux queux escoter deveront.*] This is a law of great equitie, that such as be faulty should onely be contributory to the payment of fine and amerciament.

(6) *Al eschequer.*] For that court is the true center, into which all the kings revenue and profit ought to fall, and by this means the toll shall come to the right mill.

See hereafter
cap. 45.

(7) *Et non pas le total.*] But particularly, and by parcell, upon every one that ought to contribute.

Rot. Parl. an.
17 E. 3. nu. 37.

The commons petitioned, that no common fine of any county from thenceforth should be made, but that every man may be particularly punished. Whereunto the kings answer was,

The king willeth the same.

C A P. XIX.

EN droit des vic', ou auters queux respoign' per leur maines al eschequer, et queux ount resc' de les det's le roy (1) pier le roy que ore est, ou les det's le roy mesme avant ceux heures, et queux ne dunt my acquites de ceo les dettours al eschequer: purview est, que le roy envoiera bones gentes per tous les counties, a oyer tous iceux, queux de ceo pleine se voudront et a terminer issint la besoign', que ceux que purront monst'rer que ils eient issint avant paies, a tous jours (ent) ferront quites, le quel que les viconts ou auters ferront morts ou vives, en certaine forme que leur ferr' baill'. Et ceux que issint naver' fait, filz soient en vies, ferront punies grevement; et filz soient morts, leur heirs respoign' (2), et soient charges de la dette. Et command le roy, que les viconts, et les auters avant l'its de formes loialment acquitent les dettours a prochin accompt (3), puis que ils averont le dette resceive: et donque soit le det allowe al eschequer, issint que jammes ne veign' en summon'. Et si le vic' auterment face, et de ceo soit attaint, cy rendra al plaintise le treble de ceo que il aver' de luy resceive, et soit rent a le volunt le roy. Et bien se garde chescun vicont, que il eit tiel resceivor, pur que il voudra responder (4), car le roy se prendra del tout as viscont, et a leur heirs. Et si auter que respoign' per sa maine al eschequer le face, il rendra le treble al plaintise, et soit rent en mesme le maner. Et que les vic' facent rayles a tous iceux, queux paieront * le det le roy. Et que la summons deschequer a tous les debtors, queux demander voudront la view, facent monst'rer sans denier les a nuluy, et ceo sans rien prender de louer, et sans rien don' (5),

* [198]

et

IN right of the sheriffs, or other, which answer by their own hands unto the exchequer, and which have received the king's father's debts, or the king's own debts before this time, and have not acquitted the debtors in the exchequer; it is provided, that the king shall send good and lawful men through every shire, to hear all such as will complain thereof, and to determine the matters there, that all such as can prove that they have paid, shall be thereof acquitted for ever (whether the sheriffs or other be living or dead) in a certain form that shall be delivered them; and such as have not so done (if they be living) shall be grievously punished; and if they be dead, their heirs shall answer, and be charged with the debt. And the king hath commanded, that sheriffs and other afore said, shall from henceforth lawfully acquit the debtors at the next accompt after they have received such debts; and then the debt shall be allowed in the exchequer, so that it shall no more come in the summons; and if the sheriff otherwise do, and thereof be attained, he shall pay to the plaintiff thrice as much as he hath received, and shall make fine at the king's pleasure. And let every sheriff take heed, that he have such a receiver, for whom he will answer; for the king will be recompensed of all, of the sheriffs and their heirs. And if any other, that is answerable to the exchequer by his own hands so do, he shall render thrice so much to the plaintiff, and make fine in like manner. And that the sheriffs shall make tallies to all such as have paid their debt to the king; and that the summons of the exchequer be shewed to all debtors

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that

et que ne le fra, le roy prendra a luy grevement.

that demand a sight thereof, without denying to any, and that without taking any reward, and without giving any thing; and he that doth contrary, the king shall punish him grievously.

(51 H. 3. stat. 4. 42 Ed. 3. c. 9. 7 H. 4. c. 3.)

W. 1. ca. 32.

(1) *Detts le roy.*] Under this word [*debitum*] are all things due to the king comprehended; and not onely debts in their proper sense, but duties or things due, as rents, fines, issues, amerciaments, and other duties to the king received, or levied by the sheriffe: for debt in his large sense signifies, whatsoever any man doth owe, and *debere dicitur, quia deest habere: debitori enim deest quod habet, cum sit creditoris, maxime in casu domini regis.*

(2) *Lour heires responderont.*] That is to be understood, *quoad restitutionem, sed non quoad pœnam*; that is, for the civill, but not for the criminall part: for it is a maxime in law, *pœna ex delicto defuncti hæres teneri non debet*: and againe, *in restitutionem, non in pœnam hæres succedit.*

(3) *Au prochein account.*] See for this the statute of 51 H. 3. Statutum de Scaccario, and the statute of W. 4. Vet. Mag. Chart. fo. 33, 34.

(4) *Et tiel receivour pur quoy il voet responder.*] For the rule of this, and like cases of the king, is, *respondeat superior.*

(5) *Et que la summons deschequer a tous les debtors, queux demander voudront la viewe, facent monstrer sans denier les a nulluy, et ceo sans rien prender de louer, et sans riens don', &c.*] That is, the proces, together with the estreats under the seale of the exchequer shall be shewed to the party presently without denyall, and freely without any thing to be given therefore, upon pain of grievous fine and imprisonment.

42 E. 3. ca. 9.
7 H. 4. ca. 3.

C A P. XX.

PURVIEW est eusement de misfeasors (2) en parkes (1), et en viviers (3), que si ul de ceo soit attainé per le suit del plaintife (4), soyent agardés bones et hautes amendes (5), selonque le maner del trespass, et eût la prisonnement de trois ans (6), et dillong; soit rent a le volunt le roy (7), sil ad de quoy poit estre rent, et lors trova bon fuerie que il jammes ne misface (8). Et sil neit dont poit estre issint rente, apres la prisonnement de trois ans, trova mesme le fuerie (9), et sil ne puisse trouver

IT is provided also for trespassers in parks and ponds, that if any be thereof attained at the suit of the party, great and large amends shall be awarded according to the trespass, and shall have three years imprisonment, and after shall make fine at the king's pleasure (if he have whereof) and then shall find good surety, that after he shall not commit like trespass; and if he have not whereof to make fine, after three years imprisonment, he shall find like surety; and if he cannot find

*trouver la suerty, for jur' la realme (10). Et si ul de ces rette soit fugitive, et neit terre, ne tenement suffisant par quoy il soit estre justifie, cicourt * come le roy avera ceo trouve per bone enquest, soit demand de countie en countie. Et sil ne veigne, soit utlage. Purview est ensement et accorde, que si ul ne fust dedeins an et le jour pur le trespas fait, le roy avera le suit, et ceux queux il trova de ceo rettes per bon enquest, seront punies per mesme le maner en tous points, sicome desuis est dit. Et si ul tiel misfeisour soit attain, quil eit prise en ses parkes beafts domestes (11), ou auter chose en le maner de robberie (12) en venant, ou demurrant, ou en returnant, soit fait de luy common ley, que affiert a celuy que est attain de apert robberie et larceny, auxibien a la suit le roy come dauter.*

find like surety, he shall abjure the realm; and if any being guilty thereof be fugitive, and have no land nor tenement sufficient (whereby he may be justified) so soon as the king shall find it by enquest, he shall be proclaimed from county to county; and if he come not, he shall be out-lawed. It is provided also and agreed, that if none do sue within a year and a day for the trespasss done, the king shall have the suit; and such as be found guilty thereof by lawful enquest, shall be punished in like manner in all points as above is said. And if any such trespassser be attained, that he hath taken tame beafts, or other thing, in the parks, by manner of robbery, in coming, tarrying, or returning, let the common law be executed upon him, as upon him that is attained of open theft and robbery, as well at the suit of the king, as of the party.

Capt. Itin. Vet. Mag. Chart. 155. Rot. Claus. 17 H. 3. m. 9. (Regist. 80. 111. Rast. 651, &c. Kel. 39. 202. Dyer 238. 47 Ed. 3. 10. 9 H. 6. 2. 5 H. 5. 1. 19 H. 8. 9. 18 H. 6. 21. 21 H. 7. 21. 13 H. 7. 10. 12. Fitz. Barre, 83. Keilw. 114. b. 2 Ed. 4. 4. b. 9 H. 3. stat. 2. c. 10, 11. 1 Ed. 3. stat. 1. c. 8. 1 H. 7. c. 7.)

The cause of the making of this statute was, that at the common law, the plaintife in an action of trespass, should, as in other cases, recover no other damages, but according to the quantity of the trespassse: which the plaintife for trespassses in parks and vivaries esteemed at a high rate; but the country commonly found the damages very small; for the common law gave no way to matters of pleasure (wherein most men do exceed) for that they brought no profit to the common-wealth; and therefore it is not lawfull for any man to erect a park, chase, or warren, without a licence under the great seale of the king, who is *pater patriæ*, and the head of the common-wealth.

(1) *En parks.*] This is understood of a lawfull parke, whereunto three things are required: 1. A liberty, either by graunt, as is aforesaid, or by prescription. 2. Inclosure by pale, wall, or hedge. And 3. beafts savages of the parke, for the which, and for the name, see the first part of the Institutes.

But this statute extendeth not to a nominative park erected without lawfull warrant, albeit it be called a park; for this statute is very penall, and therefore, as hath been said, extendeth onely to a lawfull parke. But he may have an action of trespassse at the common law, *quare clausum fregit, et unam damam cepit*, &c.

Under this word park, a chase is not included.

3 H. 6. 55. 8 E. 4. 5. See the statutes of 13 R. 2. c. 13. 19 H. 7. ca. 11. 14 H. 8. cap. 1. 3 Jac. c. 13. 7 Jac. c. 13. 21 Jac. c. 28. 3 Car. cap. 4.

47 E. 3. 10. b. 9 H. 6.

Temps E. 2. tit. aet' sur lestat. Br. 48. Li. 11. fo. 86, 87.

1. Part of the Inst. sect. 378.

9 H. 6. 2. 18 H. 6. 21. 19 H. 6. 6. 22 H. 6. 59. 34 H. 6. 28. 43. 10 H. 7. 6. b. 12 H. 8. 10. a. 43 E. 3. 13. 24. 38 E. 3. 10.

This

Q3

* 21 H. 7. 21.

* This act extends not to a forest in the hands of a subject, for the law is so penall, as it shall not be taken by equitie.

† 30 E. 3. f. 11.
the countesse of
Athols case.

(2) *Misfeasons.*] In this act is understood when a man either chaseth in a park, or by bow, or other engine endeavourerth to kill some of the game of the park against the liberty and priviledge of the park, † and not when the lord of a park takes beasts to agistment in his park, and the owner breaks the park, and takes them away without agreement for their pasture, for it is not within these words, *de malefactoribus in parcis*, because the trespassse concerneth not the liberty of the park by chasing of the game thereof, but a collaterall trespassse, *et sic de similibus*.

Brit. fo. 34-

[200]

Flet. li. 2. c. 36.

(3) *Vivers or viviers.*] This being a French word, signifieth fish-ponds, or waters wherein fish are kept and nourished; which being a matter of profit, and increase of victuals, any man may erect; and that in legall understanding it signifieth a fish-pond, or waters where fish are kept, it appears by our ancient authors, who wrote soone after this time: for Britton saith, *Auxi de wost fait per eux en parks & en vivers, de venison & de pesson, & de conies, & auter destruction per eux fait en garrens*: where he applyeth venison to parks, pesson to vivers, and conies to warrens. And Fleta agreeth with him, for he saith, *De feris et piscibus potest fieri furtum: ex benignitate tamen principis constituitur, ne quis pro huiusmodi furto vitam perdat, neque membra: constitutio quidem talis est, provisum est de malefactoribus in parcis et vivariis, quod ad seclam querentis statim adjudicentur emendæ, &c.* and reciteth summarily this act; and so it is taken before in this very parliament, cap. 1. for fish-ponds, or places where fish are kept, in these words, *ne turge en auter parke, ne pisse en auter viver*. And Bracton, who wrote a little before our statute, coupleth them together in the charge given by the justices in eyre, as our statute doth, *viz. De malefactoribus in parcis, et vivariis*.

Vide hic cap. 1.

Bract. li. 3. fo.
117.

F.N.B. 88. H.

It appeareth in the Register, that there be divers formes of writs for fishing in his piscarie: one writ is, *quare in vivariis suis piscatus fuit*: another, *quare in separali piscaria ipsius A. piscatus fuit, &c.*

Hic c. 1. Art.
super cart. c. 18.
34 H. 6. 28.
21 H. 7. 21.
F.N.B. 67. d.

Therefore, as some have stretched this word too far, extending it to warrens of conies, which they might as well under the generality of the word [*vivarium*] extend it to forests and chases (for they be *loci ubi viventes custodiuntur*) whereof you have heard before; so some would restraine this word to fish-ponds onely that be in parks, which is expressly against both the letter and meaning of this act, and the fish-pond concerneth nothing the liberty and priviledge of the park, whereof also a touch hath been given before.

If a man committeth a trespassse in the fish-pond, &c. of another, by taking and carrying away of water, he is no misfeaseor within this statute; but if he let out the water, to the end to take fish, he is a misfeaseor within this statute, or he must fish there, if he be within the danger of this law, for collaterall trespassses neither in parks, nor fish-ponds, &c. are within this act.

And if one hunt in a park, or fish in a pond, &c. though he kill no deer, nor take any fish, yet this is a misfeasons within this statute.

Regist. 111. b.
47 E. 3. 10. b.

(4) *Per le suit del plaintife.*] This suit is intended in an action of trespass, but the writ must rehearse, and be grounded upon this statute;

statute; for it is a maxime in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law: and therefore in this case the plaintife may either have his remedy by the common law, or upon the statute; if he bring his action of trespassse generally without grounding the same upon the statute, then he waiveth the benefit of the statute, and taketh his remedy by the common law.

5 H. 5. 1. 2 E. 4.
4. 9 H. 6. 2.
F.N.B. 67. d.
87. a. 7 El.
Dier 238. Lib.
Intr. Kast. 585.

The presidents of this action are. *Ad respondendum tam domino regi, quam parti querenti*: and yet by the Register, he may have this in his owne name, and that may be gathered by some of our books, quoted before in this section, in the margin.

7 El. Dier 238.
Regist. ubi sup.

(5) *Soient agardes bones et hautes amends.*] By these words [shall be awarded good and large amends] if the damages be too small, the court hath power to increase the damages, for this word [award] properly belongeth to the court.

(6) *Et eit la prisonment de trois ans*] Both damages and imprisonment concerne the plaintife, and therefore the kings pardon cannot dispense with them: but the ransome, the finding of surety, and the forejuring of the realme are punishments exemplarie, and concerne the king, and therefore he may pardon the same.

Dier ubi sup.
15 El. Dier 323.
9 El. Dier 269.

(7) *Et dillonque soit rent a le volunt le roy.*] And after shall make fine at the kings pleasure.

See before for the exposition of these words, cap. 4.

Vide hic cap. 4.
[201]

(8) *Et lors trova bone surety, que il jammes ne misface.*] And then shall finde good surety, that after he shall not misdoe.

This surety must be by recognisance to the king, and not to the plaintife; for example, the sureties in 10 l. and the defendant in 40 l. the condition must be generall, and not restrained to that park, or vivary: for example, *Quod ipse in aliquibus parcis et vivariis contra formam statuti prædicti amplius non malefaciet, &c.*

Hil. 24 H. 7.
Cor. Rege.
Rot. 26. Tr.
13 H. 8. Cor.
Rege. Rot. 480.

(9) *Le roy avera le sute.*] Either by indictment, information, or action of trespassse upon this act.

(10) *Forjure le realme.*] Fleta translating this act into Latine, saith, *abjurabit regnum*, and so doth the Register; and Bracton useth the same word in case of felony, *abjurabit regnum*.

Fleta, l. 1. c. 36.
Regist. 80. b. &
fol. 111. b.
B. acton.
Brit. fo. 7. 25.

And Britton useth our word, *forjure nostre realme*, and fol. 25. in the same case he useth the word of abjuration.

Mag. Chart. c.
29.

It signifieth in law a perpetuall banishment of the defendant out of the realme, which to observe he bindeth himselfe by oath, for so much is implied in this word *forjure*, or *abjure*, which properly signifieth to forswear the realme.

By the common law no man can be exiled, or banished out of his country, but in case of abjuration for felony: in all other cases exile or banishment ought to be done by authority of parliament (as here it is) and so are our books that speak of exile or banishment to be understood.

If such a person, as hath forjured or abjured the realme, returne againe, he shall be punished at the kings suit for the perjury, and high contempt.

(11) *Beasts domests.*] This is understood of kine, oxen, sheep, and other domestical beasts within the park.

If there be within the park tame deere, and misdoers come to hunt and kill venison, and they kill a tame deere, and carry it away, not knowing the same to be a tame deere, this is no

10 E. 4. 15. b.
Stamf. Pl. Cor.
25. b.

felony, for the intent maketh felony, and so are the books to be intended.

First part of the
Instit. sect. 501.

(12) *En le manner de robbery.*] In this act robbery is taken in a large sense; see the first part of the Institutes.

C A P. XXI.

EN droit des terres des heires deins age, queux sont en le garde leur seigniors: purvieu est, que les gardeins les gardent, et susteinent, sans destruction faire en tout rien: et que de tiels manners des gardes soit fait en tous points selonque ceo que est conteigne en la graund charter des franchises fait en temps le roy H. pier le roy que ore est, Magna Charta, cap. 4, 5, & 6. Et que issint soit use de formes, et per mesme le manner soient gardes les archivesques, evesques, abbes, esglises, et dignities en temps de vacation. Vide Artic' super Chartas cap. 18.

* [202]

IN right of lands of heirs being within age, which be in ward of their lords; it is provided, that the guardians shall keep and sustain the land, without making destruction of any thing; and that of such manner of wards shall be done in all points, as is contained in the great charter of liberties made in the time of king Henry, father to the king that now is, and that it be so used from henceforth. And in the same manner shall archbishopricks, bishopricks, abbeys, churches, and all spiritual dignities be kept in time of vacation.

(Bro. Wast. 32. 37. 49. 68. 107. 137. 1 Inst. 54. Bro. Wast. 58. Regist. 72, 9 H. 3. stat. 1. c. 4. 6 Ed. 1. stat. 1. c. 5. 13 Ed. 1. stat. 1. c. 14. 28 Ed. 1. stat. 3. c. 18. 36 Ed. 3. c. 13.)

Mag. Chart.
c. 4, 5, 6.
Artic. super
Chart. ca. 18.

This act both to heirs in ward, and the custody of archbishopricks, bishopricks, &c. during vacation, is but a confirmation of the statute of *Magna Charta*, cap. 4, 5, 6. whereof there you may reade at large.

C A P. XXII.

DES heires maries deins age, sans le gree de leur gardeins, avant que ils averont passes l'age de xiiii. ans, soit fait selonque ceo que est contenue en le purveiance de Merton, cap. 6. Et de ceux que seront maries sans le gree de leur gardeins puis que ils averont passes l'age de xiiii. ans, le gardein eit le double value de son mariage, selonque le tenour de mesme le purveyance. Ouser ceo ceux queux averont justret le mariage (1), rendant le droit value del mariage

OF heirs married within age, without the consent of their guardians, afore that they be past the age of fourteen years, it shall be done according as it is contained in the statute of Merton. And of them that shall be married without the consent of their guardians, after they be past the age of fourteen years, the guardian shall have the double value of their marriage, after the tenour of the same act. Moreover, such as have with-

mariage al gardein pur le trespasse, et jalemeins le roy eit les amends solonque mesme le purveyance de celui que le avera sustret, Westm. 2. cap. 35. Et des heires females (2), puis que ils averont accomplies lage de xiiii. ans, et le seignior a que le mariage appent celes ne voudra marier, mes pur covetise de la terre, les voudra tener dismarie. Purvieu est, que le seignior (3) ne poit aver ne tener per encheson del mariage (6), les terres (5) a tielx heires females oustre deux ans apres la terme de lavantdit xiiii. ans (4). Et si le seignior deins les deux ans ne les marie, donques ciant els actions de recover leur heritage quietment sans rien done pur le garde, ou pur la mariage. Et si els pur malice, ou per malveis counsel ne se voilent (7) pur leur chiefe seigniors marier, ou els nes sont disparages, que les seigniors teignent la terre, et la heritage jesque al age del enfant male, cestascavoire, xxi. ans, et ouster jesque ils ciant prises le value (8) del mariage.

withdrawn their marriage, shall pay the full value thereof unto their guardian for the trespass, and nevertheless the king shall have like amends, according to the same act, of him that hath so withdrawn. And of heirs females, after they have accomplished the age of fourteen years, and the lord (to whom the marriage belongeth) will not marry them, but for covetise of the land will keep them unmarried; it is provided, that the lord shall not have nor keep, by reason of marriage, the lands of such heirs females, more than two years after the term of the said fourteen years. And if the lord within the said two years do not marry them, then shall they have an action to recover their inheritance quit, without giving any thing for their wardship, or their marriage. And if they of malice, or by evil counsel, will not be married by their chief lords (where they shall not be disparaged) then their lords may hold their land and inheritance untill they have accomplished the age of an heir male, that is to wit, of one and twenty years, and further until they have taken the value of the marriage.

(Cro. El. 469. Stat. Merton, cap. 6. Co. Ent. 262. Fitz. Gard. 59. 71. Bro. Gard. 86. 6 Rep. 71. Regill. 161. 13 Ed. 1. stat. 1. c. 35. Repealed by 12 Car. 2. c. 24.)

The statute of Merton provideth (as hath been said) that if any lay-man ravish an heire, or detain him within the age of 14 yeares, that then the gardien should recover the value of the marriage against the ravisher together with the infant and his lands, and that the defendant should be imprisoned untill he hath recompenced the plaintife, &c. and further, untill he hath satisfied the king for the trespasse.

This act doth first confirme the statute of Meiton, both concerning the ravishment, and also concerning the forfeiture of mariage: and provideth further, that of them that be above the age of 14 yeares (over and above the double value of the marriage after tender made according to the statute of Merton to be recovered against the heire) the gardien shall recover against the ravisher or detainer, the heire being married, the full value thereof, and the king shall have also like amends according to the said act.

(1) *Ceux que averont sustret le mariage.*] That is, the ravisher or detainer of the heire, and which married the heire after 14, and before 21.

This extendeth after 14, as well to ecclesiasticall, as lay persons, which

Merton, cap. 6.
21 E. 3. 19. 20.
27 H. 6. tit. gard.
118. 33 E. 3.
Judgement 251.

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which the statute of Merton of a ravishment before 14, doth not, but to lay men onely.

Brit. fol. 169.
35 H. 6. 40.
35 H. 6. Gard.
71. 39 H. 6. c. 2.
F.N.B. 143. d.

(2) *Et des heires females.*] The mischief before this act was, that whereas the heire female after her age of 14 yeares, ought of right to be out of ward, the lord for covetousnesse would not marry them, but keep their lands at their will and pleasure many yeares after their age of 14, against the which wrong this statute provideth remedy, and was made for the restraint of the wrong, and in truth for the advantage of the lords.

Bract. l. 2. fo.
86. b.

And here we are occasioned to explain a place in Bracton, *Fœmina 14. vel. 15. annorum potest disponere domui sue, et habere cone et key, &c.* Which word [*cone*] is mistaken in the impressiõ, for it should be *cover et key*; and for *cover* we use *cofer* at this day, changing the *v* to an *f*, (which is usuall) so as at that age like a good hufwife shee is able to discern what things are in a household fit to bee kept in cofer under locke and key; and the reason, wherefore, if the heire female of a tenant by knights service be of the age of 14 years at the death of her auncester, she shall not be in ward, is, for that she is *virii potens*, and can govern an household, and may marry an husband, which may doe knights service.

See the first part
of the Institutes,
sect. 103, 104.

If a man hath two daughters and dieth, the one above the age of 14, and the other within the age of 14, the lord shall have the wardship of the body of her within age, and the moiety of the land.

35 H. 6. 52.

(3) *Purview est que le seignior.*] 1. Every lord is not within the purview of this act. The heire female shall enter upon the lord by posteriority, because her marriage belongs not unto him.

35 H. 6. ubi
supra.
Gard. 71.

2. If the lord graunt the mariage of the heire female to one, neither the grauntor nor the grauntee shall have two years, but the heir female shall enter at her age of 14, for the grauntee cannot hold the land, and the grauntor hath not the mariage.

35 H. 6. ubi su-
pra.

3. So it is, if the king graunteth the wardship of the body of the heire female, she shall sue her livery at her age of fourteen, for neither the king nor his grauntee can hold the land during the two yeares.

35 H. 6. 52.

(4) *Per 2. ans ouſer les 14. ans.*] By this is understood that the lord shall not have the 2 yeares, but where the heire female was within the age of 14, at the death of her auncester, and in ward to the lord.

(5) *Les terres.*] Here a mesnalty that is holden is understood, though this statute speak of lands onely.

35 H. 6. ubi su-
pra.

(6) *Per encheson de mariage.*] *Cessante causa cessat effectus*, and therefore if within the two yeares the lord marieth the heire female, the heire female shall presently enter, because for that cause the two yeares are given.

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If the gardien marry the heire female after the age of 12 yeares, he shall not detaine her land but untill her age of 14, for the cause ceaseth.

F.N.B. 143. d.

So it is if the auncester marricth his heir female, and dieth before shee attain to her age of 14, the land shall be in ward, but the lord shall not have the 2 yeares.

35 H. 6. 40. tit.
Gard. 71.
Institutes, ubi
supra.

And it is to be observed, that the lord hath these two years by force of this act, and not as gardien, because his gardienſhip ended at her age of 14, and therefore a writ of dower doth not lie against

against him during those two yeares, because he holdeth not the land as gardien.

And for that cause if the lord tender to her a marriage, and she within the two years marry her selfe elsewhere, there lieth no forfeiture of marriage against her. 35 H. 6. Gard. 71.

(7) *Et si els per malice ou mal-veis conseil ne soy voillent, &c.]* Here the act in hatred of contradiction and disobedience, in odium contradictionis et disobedientiæ, giveth to the lord her lands untill her age of 21, &c. but he holdeth not the same as gardien for the cause afore said.

Of this whole act Fleta saith thus, *de fœmellis 14 annos habentibus*, Fleta, l. i. c. 12.
quibus domini sui maritadium competens medio tempore non obtulerint, taliter provisum est, quod negligentia dominorum hujusmodi talibus hæredibus, non sit damnoſa, sed retenta hæreditate per duos annos post 14 annos, eam hæredibus sine contradictione reddere non contradicant; quod si infra ætatem competenter et palam contulerint, ipsæque maritari non consenserint, tunc usque ad ætatem masculinam hæreditatem talium impune poterint retinere ulterius quam per duos annos, pro sine maritaggi, et in odium contradictionis et inobedientiæ.

(8) *Ouster jesque ils eient prises le value.]* Here the profits are accounted to goe in satisfaction of the value. *Vide le statute de Merton cap. 6.*

If the lord grant over the wardship of the body onely, neither grauntor nor grauntee shall take the advantage of this branch.

C A P. XXIII.

PURVIEW est ensement, que en city, burgh, ville, faire, ne marche, ne soit nul home forein, que soit de cest realme (1), distreine pur dette (2), dont il nest dettour ou pledge, et que le fra, serra grevouement punie, et sans delay soit le distresse delivrer per les bailifes due lieu, ou per auter bailifes le roy, si mestier soit.

IT is provided also, that in no city, borough, town, market, or fair, there be no foreign person (which is of this realm) distrained for any debt wherefore he is not debtor or pledge; and whosoever doth it, shall be grievously punished, and without delay the distress shall be delivered unto him by the bailiffs of the place, or by the king's bailiffs, if need be.

27 E. 3. Sta. 2. c. 17.

The mischief before this statute was, that divers cities, the cinque ports, boroughs, towns corporate, &c. within this realme, did claime such a custome, that if any of one city, society, or merchant guild were indebted to any of another city, society, or merchant guild, if any other of the same city, society, or merchant guild that the debtor was of, came into the city, society, or merchant guild whereof the creditor was, that he would charge such a foreiner for the debt of the other; which customes are taken away by this statute, wherof Fleta teacheth in these words; *solent plerique homines in feriis, mercatis, civitatibus, burgis, et feodis, et in jurisdictionibus suis aliquos transeuntes de feodis, vel jurisdictionibus suis nullatenus existentes ad querimoniam alicujus invenientis plegios de prosequendo impedire,*

Fleta, li. 2. c. 56.
 Cap. Itin' in
 Vet. Mag. Cart.
 fo. 55.

impedire, disfringere et gravare pro alieno debito, cujus non fuerit plegius nec debitor, imponentes ei quod erat tali debitori affinis, ut de una societate vel civitate, et hujusmodi et impune: propter quod provisum est, et inhibitum, ne quis aliquem forinsecum, dum plegius non fuerit nec debitor, pro aliquo debito alieno alicubi distringat, nec ad aliquam solutionem compellat, et qui fecerit graviter punietur.

Mirrour, cap. 5.
sect. 4.

And it seemeth by the Mirrour, treating of this chapter, that such customes were against the common law, for there it is said, *le point de tortiousnes distresses duiſt contene le paine de roberie.*

(1) *Que soit de cest realme.*] These are materiall words: for if a merchant of England be either wrongfully imprisoned in the parts beyond the sea, or have his merchandises or goods taken from him there wrongfully, he shall have the kings letter to the king, prince, or lord of that territorie, where the wrong is done, wherein the wrong is briefly recited, and request made, *quod satisfactionem debitam ac justitiæ complementum fieri faciat, &c.* which letters of divers

Regist. fo. 129.

27 E. 3. Stat. 2.
cap. 17.
4 H. 5. c. 7.

formes appeare in the Register. Now if he be destitute of justice there, then may he either have the kings writ *de arresto factio super bonis mercatorum alienigenarum pro transgressionem facta mercatoribus Angliæ*, or else according to the law of marque, he shall have from the king letters of marque or reprisall under the great seale, whereby he may redresse himselfe of the goods of any of the men of that territorie taken within this realme. And it is called the law of marque, of a Saxon word, which signifieth a limit or bound; because seeing he cannot obtaine justice within the limits of the foreine country, he may be redressed of the men of that country within the limits of his owne: which appeareth by the statute of 27 E. 3. in these

27 E. 3. ubi sup.

words, "No merchant stranger be impleaded for anothers trespassse, " or for anothers debt, whereof he is not debtor, pledge, nor mainpennor. Provided alwayes, that if our liege people, merchants, " or other be endamaged by any lords of strange lands, or their " subjects, and the said lords (duly required) faile of right to our " said subjects, we shall have the law of marque, and of taking " them againe, as hath beene used in times past, without fraud or " deceit." Wherein many things are worthy of observation; and (amongst them) that this law of marque extends not onely to merchants, but to all other the kings subjects. And this law of marque in some records is called the kings right, *jus regium*, because thereby he doth his subjects right: as taking one example for many, in the parliament holden in 11 H. 4. John Kowley of Bridgwater, in his petition prayed the king that he might take marque and reprisall of all French-mens goods, (having no safe conduct of the king) to a certaine value, for certaine his ships and other goods taken by the French in the time of the truce: the answer of the king was, that upon suit made to the king, he should have such letters requisitory as are needfull, and if the French king refuse to doe him right, the king will then shew his right. This letter of marque or reprisall was anciently called *littera mercatoria*, (because most commonly merchants obtained it) *littera mercatoria conceditur mercatoribus Anglis contra mercatores Heynon, Holland, Zealand, et Frisland.* So as if those words [which is of this realme] had been omitted, and the statute had been generall in the negative, that no foreine persons should be distrained for any debt, wherefore he is not debtor or pledge, this had taken away the ancient law of marque or reprisall; and therefore necessarily were added the said words [which is of this

Rot. Parl. an. 11
H. 4.

Norw Tr. 33 E. 1.
Corā rege rot. 18.
Mat. Paris fo.
966 b.

this realme] whereby the law of marque or reprisall is implied and saved.

(2) *Distreine pur dett.*] At this time a capias did not lie in an action of debt, but is given by the statute of 25 E. 3. cap. 7. statute doth extend to the capias, because the capias commeth in lieu of the distres.

C A P. XXIV.

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PURVIEW est ensement, que nul escheator, viscount, ne autre bailiffe le roy (1), per colour de son office (2), sans especiall garrant (3), ou commandement (4), ou certaine autoritie que appent a son office (5), ne disseise nul bome de son franktenement, ne de chose que appent a son franktenement. Et si ascun le fait, soit a le volunt le disseisee, que le roy de son office le face amend' a son pleint, ou que il eit la common ley per brieve de novel disseisin (6). Et celui que serra de ceo attaint, rendr' les damages a double a mesme le plaintif, et serra en le grevous mercie le roy.

IT is provided also, that no escheator, sheriff, nor other bailiff of the king, by colour of his office, without special warrant, or commandment, or authority certain pertaining to his office, disseise any man of his freehold, nor of any thing belonging to his freehold; and if any do, it shall be at the election of the disseisee, whether that the king by office shall cause it to be amended at his complaint, or that he will sue at the common law by a writ of novel disseisin; and he that is attained thereof shall pay double damages to the plaintiff, and shall be grievously amerced unto the king.

(1 R. 2. c. 9.)

The mischief before this statute was, that eschaetors, sheriffes, and other of the kings bailiffes, would, *colore officii*, seise into the kings hands the freehold of the subject, and thereby disseise the partie, who thereupon to his intolerable vexation and delay, was put to his suit to the king by petition, for which this statute provideth remedy.

(1) *Bailiffe le roy.*] Here by bailiffe is understood any other officer or minister of the kings.

(2) *Per colour de son office.*] *Colore officii* is ever taken in *malam partem*, as *virtute officii* is taken in *bonam*: and therefore this implyeth a seisure unduly made against law. Pl. com.

And he may do it *colore officii* two manner of wayes: either when he hath no warrant at all, or when he hath a warrant, and doth not pursue it.

(3) *Especial warrant.*] That is, to the eschaetor, &c. a *diem clausit extremum*, *mandamus*, or any other of the kings writs, and office thereupon found for the king.

Likewise to the sheriffe the kings writ, as an *habere facias seisinam*, or the like.

By this act no seisure can be made of lands or tenements into the kings hands before office found, and so is the common experience at this day. See the statute of *articuli super cart*, cap. 19. 29 E. 3. *lestat. de Lincolne*.

5 E. 6. Br. 55.
tit. Office Li. 3.
fo. 163.
Paris Stough-
tons case.
Art. super cart.
ca. 19. 29 E. 3.
Stat. de Lincoln.

(4) Ou

* 17 E. 2. aff.
371. 32 E. 1.
ibid. 378. 4 E. 2.
diffail. 10. 8 E.
2. coron. 390.
3 E. 3. coron.
347. & 300.
8 E. 3. 38 15 E.
3. extent 17.
31 aff. 28. 10 E. 3.
47. 17 E. 3. 66.
22 aff. 96, 81.
44 aff. 14. 43 E.
3. 24. 26 aff. pl.
32. 7 H. 4. 41.
13 H. 4. 13.
Stamf. pl. cor.
192, 193. Pl.
com. Morgans
case, 12, 13.
4 E. 1. officium
coronat.
1 R. 3. cap. 3.
Stamf. prærog.
regis, 83, 84.

* [207]

Bract. lib. 3. fo.
121. b.
Brit. fo. 3, 4.
Flet. li. 1. c. 18, 25.
Mirr. ca. 1. § 5.

28 E. 3. 94.
Mortimers case.
Rot. Parl. 8 R.
2. nu. 14. the
Prior of Moun-
tegues case ad-
judged in parlia-
ment. 4 H. 6.
29, 30.

9 H. 7. 10.
30 aff. p. 5.

(4) *Ou commandement.*] Under these words are comprehended not only the king's commandements by his writs, as hath been said, but also the commandement of the justices of the kings courts of justice.

* A man was indicted before the sheriffe in his tourne of felonie, upon which indictment his lands and chattels were by the sheriffe seised for the king: afterward before justices assigned he was acquitted, and sued out a *certiorari* to remove the record into the kings bench; which being removed, he prayed there to have restitution of his lands and goods; and it was resolved that the sheriffe had not warrant to seise the lands, (before he were attainted) and therefore that he should sue his assise against the sheriffe upon this statute. It was further resolved, that if the sheriffe seise lands by the commandement of the justices, then is the sheriffe excused, though the justices therein did erre; and if he did it of his owne head, then had the party remedy by an assise; therefore * the partie was required to sue out a writ to the justices to certifie if the seisure were made by their commandement.

(5) *Ou certain authoritic que appent a son office.*] That is, *ex officio*, without any writ or commandement: for example, when the eschaetor taketh an office *virtute officii*, he may seise the land; for this, as our act saith, doth belong to his office; but if of his owne head (as hath beene said) he seiseth the land without any office, that seisure is *colore officii*, and therefore the assise upon this statute is maintainable against him in that case, *et sic de cæteris*.

(6) *Per brieve de novel disseisin.*] This is put for an example, for he may have any other writ, or action against him.

This statute is made in asfirmance of that, which ought to have been done by the common law, and is the foundation as well of our book-cases above-said, as of the acts of parliament, that after have been made concerning undue seisures by escheators, sheriffes, and other bailifes, as coroners, and the rest.

And if it doth appeare to the court, that the kings officer doth seise for the king any lands without warrant against the law, in an action brought against the officer, he ought not to have any aid of the king; neither doth the writ *de domino rege inconsulto* lie in that case, because that which is done by him is void; and where the cause of aid faileth, there no aid is to be granted. It were against reason, that the king, who is the head of justice, should aid him in his wrong; and therefore this act for doing of wrong in the kings name, doth give the party grieved an assise against him, wherein the plaintife shall recover his land, and double damages, and besides the kings officer shall be in the grievous mercy of the king, for doing injury in his name to the subject.

Therefore in a reall action, if the eschaetor (of whom this statute speaketh) be examined, and upon his examination saith generally, that he hath seised the lands in demand into the kings hands; this is not good, and the action shall proceed, for he must shew the cause of the seisure, (as is implied in this act) which cause, if it appeare to be against the law, the judges of the law ought to disallow the same.

C A P. XXV.

NUL *minist' le roy* (1) *ne maintaine* (2) *per luy, ne per auter, les ples, parols, ou besoignes queux sont en la court* (3) *le roy* (4), *des terres, tenements, ou des auters choses* (7), *pur aver part de ceo* (5), *ou auter profit* (6) *per covenant fait* (8). *Et que le fra, soit punie a le volunt le roy* (9).
Vide Champertie 11 Ed. 1.

NO officer of the king by themselves, nor by other, shall maintain pleas, suits, or matters hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth, shall be punished at the king's pleasure.

(9 H. 7. 18. 15 H. 7. 2. Regist. 182. Rast. 119. 13 Ed. 1. stat. 1. c. 49. 28 Ed. 1. c. 17. 33 Ed. 1. stat. 3.)

(1) *Nul minist' le roy.*] Fleta in rehearsing this statute, saith, *nullus minist' regis cuiuscunque fuerit officii, &c.* and another statute provideth against all others. *Minist' regis* was taken in this kings time to extend to the judges of the realme; for in the case of justice Heigham for a scandall, and reproachfull words spoken unto him, the record saith, *sicut honor * et reverentia, quæ ministris domini regis attribuuntur, ipsi regi attribuuntur; ita dedecus et infamia, quæ ministris domini regis inferuntur, ipsi regi inferuntur*: in which record and many other of that time [*ministris regis*] extend to the judges of the realme, as well as to them, that have ministeriall offices.

Flet. li. 1. ca. 30.
Brit. fo. 37. b.
Art. super cart.
ca. 11. 20 H. 6.
30, 31. M. 33
& 34 E. 1.
Corā rege. See
hereafter the 29.
and 35 chapters.
* [208]

(2) *Ne mainteigne, &c.*] Of maintenance shall be spoken in the exposition upon the 28 and 29 chapters of this parliament.

(3) *Queux sont en la court.*] By these words it is declared, that regularly champerty is *pendente placito*, and therefore a scoffement after judgement is not within this statute.

(4) *En la court le roy.*] That is, in some of the kings courts of record.

(5) *Pur aver part de ceo.*] Here is champerty forbidden by this act: first, therefore it is to be seene what champerty is; and secondly, whether it were not prohibited by the common law before this act; and lastly, what was the cause of the making of the fame.

Champerty is derived from two Latin words, *campo et parts*, and therefore champerty is a bargain with the demandant or tenant, plaintife or defendant, to have part of the thing in suit, if he prevaile therein, for maintenance of him in that suit; it is called *campi pars*, because he shall have a part of the field or land, &c. in demand, in the statute called *definitio conspirat'*, champertors are called *campi participes*, and are thus described, *campi participes sunt, qui per se, vel per alios placita movent, vel moveri faciunt, et ea suis sumptibus prosequuntur, ad campi partem vel pro parte lucri habend'*.

Every champerty is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus.

Regist. 183.
30 Aff. p. 15.
19 R. 2. Chara-
perty 15.
3 H. 6. 54.
8 E. 4. 13.

Flet. l. 2. ca. 30.
Britton, fo. 37.
47 E. 3. 9.
31 H. 6. 9.
F.N.B. 171. f.

33 E. 1. Vet.
Mag. Char. fo.
9. & 111.

It

It was an offence against the common law; for the rule of law is, *culpa est se immiscere rei ad se non pertinenti*. And, *pendente lite nihil innovetur*.

Bract. 1.3. f. 117.
Flet. li. 1. c. 20.
Brit. ubi supra.
Cap. Itineris.
Vet. Mag.
Chart. 152.

Bracton, who wrote before this statute, rehearsing the articles enquirable by the justices in eyre, saith, *de excessibus vicariorum, si quam litem suscitaverint, occasione habendi terras vel custodias, vel perquirendi denarios, vel alios profectus, per quod justitia et veritas occultetur, vel dilationem capiat*; and Fleta agreeth with him, where it is said, *per quod justitia et veritas occultetur*; it appeareth that the end of champerty and maintenance is to suppress justice and truth, or at least to work delay, and therefore it is *malum in se*, and against the common law.

Mirror, c. i. § 5.

And the Mirror saith, *en perjurie chiont, &c. tous ceux ministres le roy, que maintiennent faux actions, faux appeales, ou faux defences a escient*.

11 H. 6. fo. 11.

An action of maintenance did lie at the common law, and if maintenance *en genere* was against the common law, *a fortiori* champerty, for that of all maintenances is the worst.

8 H. 5. 8.

35 H. 7. 2.

in Sub pœna.

And our act and other acts concerning champerty prohibite maintenance, and champerty *en le court le roy*, yet an action of maintenance in the nature of an action of trespass doth lie in ancient demesne, and other base courts at the common law.

11 H. 6. ubi supra.

As it is said in our books, this act and other statutes concerning champerty and maintenance doe give a greater punishment against them, that offended in maintenance and champerty then was at the common law; by this act he shall be punished at the will of the king, i. by his justices, so as champerty is both *malum in se*, by the common law, and *malum prohibitum*, by this act.

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And for that the kings ministers or officers within his courts, were in place to doe more mischief therein to the subverting of justice and truth then others, therefore this act provideth only against the kings ministers and officers of his courts.

Regist. 182.

4 E. 2. Champ-

erty 12. 21 E.

3. 12. 52. 22 E.

3. 10. 30 aff. p.

15. 50 aff. 3.

32 E. 3. Champ.

6. 19 R. 2. ibid.

15. 12 H. 4. 26.

13 H. 4. 16. 17.

8 E. 4. 1. 9 H. 7.

18 F.N.B. 172.

Regist. Judic. 57.

F.N.B. 172. k.

Note it is provided by this act that no minister of the king should maintain to have part, so that hereby it appeareth that it is no champerty unlesse the state, &c. be made for maintenancē; note the words of the writ of champerty be *assumpsit manutendend.* or *manucepit*, &c. But see after the 29 chapter, some persons prohibited to purchase at all *pendente placito*.

(6) *Ou auter profit.*] * If the tenant in a reall action graunt a rent, common, or other profit apprender out of the land to maintaine, &c. this is champerty, and yet the rent, common, &c. is not in demand, but they are profits out of the land.

(7) *Ou auters choses.*] Within these words are included leases for yeares; and other goods and chattels, debts and duties.

(8) *Per covenant fait.*] That is, by agreement, either by word or writing; for albeit in the common senie a covenant is taken for an agreement by writing, yet *conventio* in his large sense is taken (as here it is) for an agreement by writing, or by word.

(9) *Il serra puny a la volunt le roy.*] See before cap. 4. 9. 20. and hereafter cap. 26. 29.

This act concerning champerty is the foundation of all the acts and book cases that ensued.

Vide

Vide Vet. Mag. Chart. 11 E. 1. stat. de champerty. Artic. super chart. cap. 11. 33 E. 1. Definitio conspiratorum. 1 E. 2. cap. 14. 20 E. 3. cap. 4. 1 R. 2. cap. 4. And thus much for the understanding of this first act which is enlarged by divers of the acts above said.

CAP. XXVI.

ET que nul viscount, ne auter minifter le roy (1) ne preigne reward pur faire son office (2) mes sont paies de ceo que ilz purnont del roy, et que le fra rendre le double al plaintife, et serra puny a la volunt le roy.

AND that no sheriff, nor other the king's officer, take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth, shall yield twice as much, and shall be punished at the king's pleasure.

Cap. itineris Vet. Mag. Cha. fo. 155. Marl. ca. 19. 28. W. 1. ca. 3. 15. (1 Inst. 303. 23 H. 6. c. 10. 28 H. 6. c. 5.)

(1) *Minister le roy.*] Under these words, the law beginning with *nul viscount*, are understood escheators, coroners, bailiffes, gaolers, the kings * clerk of the market, aulnager, and other inferiour ministers and officers of the king, whose offices do any way concerne the administration or execution of justice, or the common good of the subject, or for the kings service; that none of the kings officers or ministers doe take any reward for any matter touching their offices, but of the king. And some doe hold that the kings heralds are within this act, for that they are the kings ministers, and were long before this statute.

Fleta, li. 2. c. 18. & 39. 27 Aff p. 14. Stamf. Pl. Coron. 49. a. * See the fourth part of the Inst. Cap. Court of the Clerk of the Market. Rot. Parl. 50 E. 3. nu. 11.

(2) *Ne preigne reward pur faire son office.*] See before cap. 10. *versus sinem*; and Fortescue saith, *Quod vicecomes jurabit super sancta Dei evangelia inter articulos alios quod bene, fideliter, et indifferenter exercebit, et faciet officium suum toto illo anno, neque aliquid recipiet colore, aut causa officii sui ab aliquo alio, quam à rege*; and note it is not said, that he shall take no reward generally, but no reward to doe his office. *Vide deuant, cap. 10.*

W. 1. cap. 10. Fort. c. 24. f. 28.

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The sheriffe, or any other minister of the king cannot prescribe to take a reward or fee for doing of his office: but the fee of 20. d. called barre fee time out of minde taken by the sheriffe of every prisoner that is acquitted, is not against this statute or any other, for it is not taken for doing his office.

42 E. 3. fol. 5. 21 H. 7. 17.

This statute is made in affirmance of a fundamentall maxime of the common law, which is *non capiant vicecomites, vel alii ministri regis præmium, vel mercedem, vel aliquid pro officio suo faciendo, sed tantum de feodis suis à domino rege sint contenti.*

Mag. Chart. c. 29. 28 E. 1. ca. 18. 36 E. 3. ca. 15.

It is a certain and true observation, that the alteration of any of those maxims of the common law is most dangerous, whereof you shall elsewhere reade some instances; whereunto you may add this ancient maxime affirmed by our act of parliament: for whiles sheriffes, escheators, coroners, and other ministers of the king, whose offices any way did concerne the administration or execution of justice, or the good of the common weale, could take no fee at all

See the preface to the 4th part of my Reports, and the third part of the Institutes, Cap. Of the high court of parliament. Verb. See here ca. 42.

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for

for doing their office, but of the king, then had they no colour to exact any thing of the subject, who knew, that they ought to take nothing of them.

Vide 4 E. 3. c. 10.
27 E. 3. cap. 4.
8 Eliz. cap. 12.
23 H. 6. ca. 10.
34 H. 8. cap.
28 Eliz. cap. 4.
3 H. 7. cap. 12.
1 H. 8. cap. 7.
11 H. 7. cap. 4.
12 H. 7. cap. 5.
8 H. 6. cap. 5.
13 R. 2. c. 4. &c.
See before ca. 4.
9, &c.

But when some acts of parliament changing the rule of the common law, gave to the said ministers of the king fees in some particular cases to be taken of the subject, whereas before without any taking at all their office was done, now no office at all was done without taking: but at this day they can take no more for doing their office, then have been since this act allowed to them by authority of parliament.

This statute doth adde a greater penalty then the common law did give, for by this act the plaintiffe shall recover his double damages, and besides they shall be punished at the will of the king, that is, by the kings justices, before whom the cause depends.

C A P. XXVII.

ET que nul clerke de justice, desche-
tor, ou denquiror (1), nul rien ne
preigne pur liverer chapiters (2), for-
pris seulement clerks des justices errants
en lour eyres, et ceo ii. s. et nient plus
de chescun wapentake, hundred, ou ville,
que respoigne per xii. ou per vi. (3)
selonque ceo que auncientment fuit use.
Et que auterment le fra, rendra le treble
de ceo quel avera prise (4), et perdra la
service de son seignior per un an.

AND that no clerk of any justicer,
eschecator, or enquiror, shall
take any thing for delivering chapi-
ters, but only clerks of justices in
their circuits, and that ii. s. and no
more, of every wapentake, hundred,
or town, that answereth by twelve, or
by six, according as it hath been used
of old time; and he that doth contrary
shall pay thrice so much as he hath
taken, and shall lose the service of his
master for one year.

Mirror, c. 4. des
Artic. des Eires,
Bract. l. 3. fo. 115;
116. Brit. ca. 2.
fo. 9, 10.
Flat. li. 1. c. 25.
Mirror, cap. 2.
§ 13. See the
fourth part of
the Institutes,
cap. Justices in
Eire.

For the better understanding of this act, the manner of the proceeding by the justices in eyre in their eyre is to be known. First, they had their authority and power by writs, which writs were at their sessions first read, *Quibus auditis, quidam major eorum et discretior publice coram omnibus proposuit quæ sit causa adventus eorum, quæ sit utilitas itinerationis, et quæ commoditas, si pax observetur, &c.* The charge being given, then were the bayliffes of the hundreds * called, and their names enrolled, and every of them sworn that out of every hundred they should choose four knights, who forthwith should come before the justices, and should be sworn, that they should choose twelve knights, or free and lawfull men, if knights could not be found, &c. by whom the business of the king the better, and with greater profit might be expedited; who being returned and sworn, then should be read to them the chapters or articles of their charge in writing indented, the one part whereof was delivered to them, and the other part remained with the justices: and commandement was given to them by the justices, that to every chapter or article they should

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answer in their verdict severally and by it selfe, sufficiently, distinctly, and openly.

Capitula verò quæ illis duodecim proponenda sunt, quandoque variantur, secundum varietatem temporum et locorum, et quandoque augmentur, quandoque minuantur.

Bract. ubi supra.
Brit. c. 3. fo. 1c.
Flet. li. 1 c. 20.
Cap. Itin' Mag.
Chart. fo. 150.

But the ordinary chapters or articles, as it appeareth by *capitula itineris*, amounted to the number of 138, or thereabouts.

(1) *Enquiror.*] Presently after the making of this statute, there was added to the chapters of the eyre the effect of this act to be inquired of, viz. *De clericis justiciariorum, escheattorum, vel aliorum ministrorum capientibus denarios pro capitulis deliberand.* &c. Where enquirors or inquisitors are included under the name of *ministri*.

Before this statute, not onely the clerks of the justices, but of escheators and other ministers and officers, that followed the eyre, did use to write them, who would doe it readily, sufficiently, and with lesse charge, which was born by the twelve of every hundred. This liberty that the subject had, could not be restrained but by act of parliament, and therefore two things are hereby provided. 1. That no clerks, &c. but onely the clerks of the justices errants in their cyres, should deliver the chapters. 2. When this act of parliament had drawn it to the hands of the clerks of the justices in eyre, it was necessary to set down in certain, what they should take, and that was but 2. s. of every hundred, which they well deserved, and the county thereby much eased.

(2) *Pur liverer chapters.*] *Capitula* are derived à *capite*, the highest and principall part of man, so when matters are distributed into principall articles, they are said to be digested into heads, which thereupon are called *capitula*: what is intended here by chapters, is declared before.

Cap. Itin' ubi sup.

(3) *Que responde per 12. ou per 6.*] For some hundreds were so decayed, as they used to answer to the chapters or articles by 6. as before time had been anciently used.

Now how this chapter could be understood without reading of the ancient authors and old records, let the indifferent reader judge.

(4) *Et que autrement le fra rendr' le treble valuc de ceo que il aver prise.*] That is to say, if any clerk, but the clerks of the justices in eyre, did for reward deliver the chapters, or if the clerks of the justices in eyre for the delivery of them did take above 2. s. they should render to them of whom they tooke treble so much as they received, and besides lose the service of their matter for one yeare.

C A P. XXVIII.

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ET que nul clerk le roy ne des justices
receive disformes presentment del
esglise, dont plea ou conteke soit en la
court le roy, sans speciall conge le roy, et
ceo descende le roy sur paine de perdre
lesglise

AND that none of the king's
clerks, nor of any justicer, from
henceforth shall receive the present-
ment of any church, for the which
any plea or debate is in the king's
court,

R 2

lesglise et son service. Et que nul clerke de justice, ne de vicon (2), ne mainteine parties (1) en quarels, ne besoignes queux sont en la court le roy, ne fraud ne face (3) pur common droiture delayer, ou disfiurber (4). Et si ull le fait, il serra punie per la paine prochainement avantdit, ou per plus grievous, si le trespassse le requiert.

court, without special licence of the king; and that the king forbiddeth, upon pain to lose the church, and his service: and that no clerk of any justice, or sheriff, take part in any quarrels of matters depending in the king's court, nor shall work any fraud, whereby common right may be delayed or disturbed; and if any so do, he shall be punished by the pain afore said, or more grievously, if the trespass do so require.

(Regist. 182. 189. Rast. 119. 427, &c. 28 Ed. 1. c. 11. 1 Ed. 3. stat. 2. c. 14. 4 Ed. 3. c. 11. 20 Ed. 3. c. 4. 1 R. 2. c. 4.)

Brit. fo. 37. b.
W. 2. 13 E. 1.
c. 3. 45 E. 3.
Quar. imp. 139.

1. This act is divided into foure branches, first, that no clerk of the king, nor of any justice receive any presentment to any church, whereof any plea was depending in the kings court; the mischief before this act was, that depending a suit for a church in the kings court, the one party or the other would present the chaplain of the king, or of some of the judges, the more to countenance the one party, and discourage the other, and the mischief was the greater for that at this time, *cum aliquis jus presentandi non habens presentaverit ad aliquam ecclesiam, cujus presentatus sit admittus (i. institutus) ipse qui verus est patronus per nullum aliud breve recuperare poterit advocacionem suam quam per breve de resto.*

Regist. fo. 58.
F.N.B. 44. 8.

2. The second branch containeth the punishment, viz. that if he doth it without the kings license, he shall lose the church, that is, that the church shall be void as unto him, and that he shall lose his service, that is, that he be not after chaplain to the king during one yeare. And at this time divers ecclesiasticall persons were not onely clerks in the chancery, and other the kings courts, but also stewards of household to noble men, justices, and other great men.

3. The third branch is, that no clerk of any justice or sheriffe shall maintain any party in any querels, or businesse depending in the kings courts.

(1) *Ne mainteine parties, &c.] Ne manuteneas*, whereof commeth the word of art *manutentionia*, or *manutentio*, derived à *manu et tenere*: *manus* doth not onely signifie power or help by word or countenance; but *manus* is herein used, for that most usually maintenance is done by the hand, either by delivery of money, or other reward, or by writing on the behalfe of one of the parties in a suit depending.

It is in the Register thus coupled, *manutenuit et sustentavit*, and *sustentare* is properly to underprop any thing that is likely to fall.

Maintenance is an unlawfull upholding of the demandant or plaintife, tenant or defendant in a cause depending in suit, by word, writing, countenance, or deed.

This maintenance (as hath been said) is *malum in se*, and against the common law, and that is notably proved by this act, for hereby maintenance

maintenance is branded with this quality that thereby common right is delaied, or disturbed, and consequently against the common law.

And it is to be understood, that *manutentia est duplex*, that is to say, *curialis*, that is, in courts of justice, *pendente placito*, and of this the said description is given; and *ruralis*, that is, to stir up and maintaine querels, that is, complaints, suits, and parts in the country, other then their owne, though the same depend not in piea, and this is punished with great severity, as by the acts therefore provided appeareth. [213]

Manutentia curialis is divided into lawfull, and unlawfull, and into generall, and speciall, as shall be shewed in his proper place, viz. in the exposition of the act of 28 Ed. 1. *Art. super cart.* Art. Super cart. cap. 11.

(2) *Nul clerke de justice ne de viscount.*] These were prohibited by this act, because they were in place, as before hath been said, to do more mischief, that is, by their maintenance to disturbe or delay common right. See cap. 24.

(3) *Ne fraude ne face.*] This fraud is worthy of the punishment inflicted by this act, for that it tendeth to delay, or disturbe common right. that is, the due proceeding of law.

(4) *Pur common droit delayer ou disturber.*] These words refer as well to maintenance, as to fraud.

4. The fourth branch is the punishment, which evidently appeareth by the act.

C A P. XXIX.

PURVIEW est ensement, que si ul serjeant, counter (1) ou auter (2) face ul maner de disceit (3), ou de collusion en la court le roy, ou consent de faire la, en disceit de la court, pur engin' (4) le court, ou la partie, et de ceo soit attain, lors puis eit la prisonment dun an et un jour, et ne soit oye en la court le roy a counter pur nulluy (5). Et si ceo soit auter que count', per mesme le maner eit la prison dun an en dun jour a tout le meins. Et si le trespas demande greinder paine, soit a velunt le roy (6).

IT is provided also, that if any ferjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it, in deceit of the court, or to beguile the court, or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at least; and if the trespass require greater punishment, it shall be at the king's pleasure.

(8 R. 2. c. 4. 10 H. 6. c. 4. 18 H. 6. c. 9. Raft. 2. 11 Ed. 4. 3. b. Palmer, 289. Salk. 517.)

Before this statute, in the irregular raigne of H. 3. serjeants, apprentices, attorneys, clerks of the kings courts, and others did practise and put in ure unlawfull shifts and devises so cunningly contrived (and specially in the cases of great men) in deceit of the kings courts, as oftentimes the judges of the same were by such crafty and sinister shifts and practises inveigled and beguiled,

Mirr. c. 2. § 5.
des counters.

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Rot Parl. an. 5.
H. 5.

1. part of the
Instit. sect.

Flet. li. 2. c. 21.
Cust. de Norm.
cap. 64.
Mirr. ubi sup.

Mirr. ubi supra.

The oath of the
serjeant at law.

The oath of the
kings serjeant
at law.

which was against the common law, and therefore this act was made in affirmance of the common law; onely it added a greater punishment: for heare what the Mirrour saith of the serjeant at law, what his office and duty was: *Chescun serjeant counter est chargeable per serement que il ne maintenera, ne defendera tort ne faixime a son scient, eins guerpera son client, a quel heure que il puit son tort a perceiver. Auxi que il ne mitter in court faux delaies, ne faux tesmoignes ne movera, ne prosera, ne aux corruptions, deceits, menzonges, ne aux fauxes lies ne consentera, mes loialment maintenera le droit de son client, que il ne chiet per follie, negligence, ne default de luy, ne de risonne que a luy appendroit de prononcer et per mesterie, leding, despiiser, coup, polie, tenson, manace, noise, ne villanie, ne disturbera judge, party, serjeant, ne auter in court per quoy il disturbe droit ou audience.* In former times learned and grave apprentices of law came not to this state and degree *per ambitum*, but contrariwise when they were called thereunto, they assayed all means to avoid it, taking the degree of an apprentice to be the more permanent place: as taking one example for many; in the 5 yeare of H. 5. John Martine, William Babington, William Pole, William Westbury, John June, and Thomas Kolfe, six grave and famous apprentices, having writs delivered unto them to take the state and degree of serjeants retournable in Michaelmas terme, when all the meanes which they had used could not prevail, they at the returne thereof in chancery absolutely refused the same; whereupon they were called into the parliament then sitting, and there charged to take the state and degree upon them, which in the end they did, and divers of them afterwards did worthily serve the king in the principall offices of the law, as by our books appeareth.

(1) *Serjeant counter.*] Of his antiquity and calling *ad statum et gradum servientis ad legem*, I have spoken in another place. In ancient books he is called, *counter*, or *narrator* of the count or declaration, being grounded upon the originall writ, the foundation of the suit: and ierjeant being a generall word, *counter* is added to it, to restraine it to a serjeant at law. *Vide* ca. 30. And untill this day, when serjeants proceed, every of them counteth, that is, reciteth count in an action appointed to him by the judges before them.

The Mirrour saith, *Counters sont serjeants sachants le ley del realme, que servent al common del peole a prononcer & defender les actions en judgement, pur ceux que mitteront pur loier, &c.*

(2) *Ou auter.*] This extendeth to apprentices, attornies, clerks of courts, or any other.

For the better understanding of this act, it is necessary to set downe the oath of the serjeant at law.

This oath consisteth on foure parts.

1. That he shall well and truly serve the kings people, as one of the serjeants of the law.

2. That he shall truly counsell them, that he shall be retained with, after his cunning.

3. That he shall not defer, tract, or delay their causes willingly, for covetousnesse of money, or other thing that may tend to his profit.

4. That he shall give due attendance accordingly.

This oath consisteth on six parts.

1. That he shall well and truly serve the king and his people, as one of the kings serjeants at law.

2. That

2. That he shall truly counsell the king in his matters when hee shall be called.

3. And duely and truly minister the kings matters after the course of the law, to his cunning.

4. He shall take no wages or fee of any man for any matters, where the king is party, against the king.

5. He shall as duly, as hastily speed such matters, as any man shall have to do against the king in the law, as he may lawfully doe, without delay, or tarrying the party of his lawfull proces in that belongeth to him.

6. He shall be attendant to the kings matters when hee shall be called thereto.

The apprentice at law is not sworne.

Concerning attorneys, it is provided by the statute of 4 H. 4. cap. 18. that they that be good and vertuous, learned, and of good fame, shall be received, and their names put into the roll, and shall be sworne well and truly to serve in their offices, and specially that they make no suit in a forein county.

Newton, chiefe justice of the court of common pleas, gave judgement of an attourney of that court, that had sued out a *capias* without an originall, that his name should be drawne out of the roll of attorneys, and that he should never be attorney in this court, nor in any other court of the king, and that he should not meddle in them in the law; and to perform all this, he in those days was sworne on a book. And Newton said to him, The king hereafter, when you shall have better grace, may pardon you by his letters patents, &c. and then you may be restored againe.

(3) *Face ul maner de disceit.*] This must be a mis-fesauns, and not a non fesauns; for the words be doe, *i. faciat aliquam deceptionem seu collusionem, &c.* And to illustrate this matter, it is good to put some examples.

A writ of *habere facias seisinam* did falsly recite a recovery in a reall action (where in truth there was no recovery at all) by colour of which writ a man was put out of his freehold; ^a this was a collusion in deceit of the court, and the delinquent was by this statute awarded to prison, &c.

^b So it is to sue out a *capias* without an originall.

^c Also to bring a *præcipe* against a poore man, knowing that he hath nothing in the land, of purpose to get the possession of the land against the tenant who is in possession.

^d To procure an attourney to appeare for a man, and plead without warrant.

If a serjeant, or an apprentice of the law in pleading a matter of fact issuable for his client, alledge the same to be done at a towne in such a county, where in deed he knoweth there is no such towne, of purpose to delay justice, *et a enginer la court*, this is a deceit within this statute, and so it hath beene holden.

^e A. H. in execution in the counter of London, and because that prison is a strait prison, devised a shift (in deceit of the court) to be removed from thence to the Fleet, and his device was this: He made an obligation of xx. l. to S. and caused the obligation to be put in suite against himselfe in the name of S. and judgement in the court of common pleas was given against him upon his confession, and procured a *habeas corpus cum causa*, and thereupon he was brought into the court of common pleas, and there one in the

R 4

name

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4 H. 4. ca. 18.
The Roll of Attorneys.

20 H. 6. fo. 37.

^a 17 E. 3. 51.
F.N.B. 98. o.
Hil. 16. E. 1. in
Banc. 58. deceit,
& collusion sur
recovery, &c.
Radulphus Pay-
mel, &c. Hil.
22 E. 1. Rot. 70.
in com. Banc.
Allan Prats case.
^b 20 H. 6. 37.
^c 39 E. 3. fo. 15.
^d 3 E. 3. 49, 50.
semble. 4 E. 3.
37.
F.N.B. 103. a.
^e 41 E. 3. 1 Dier
20 El. 361.
^e Dier 8 El. 249

name of S. prayed that he might be committed in execution to the Fleet; and the court being beguiled, and knowing nothing of this deceit, and subtil and false practise, committed him to the Fleet, where S. never had such a debt, nor ever was privie to any of the said proceedings, A. H. and his counsellors, &c. are within this statute.

10 E. 4. 9. b.
F.N.B. 98. 1.

This act is also in affirmance of the common law, for fraud and falshood is against the common law: and therefore if the client would have the attourney to plead a false plea, he ought not to doe it, for he may plead *quod non sum veraciter informatus, et ideo nullum responsum, &c.* and that shall be entred into the roll to save him from damages in a writ of disceit: and if an attorney ought not wittingly to plead a false plea, *à fortiori*, a serjeant or an apprentice ought not to doe the same.

(4) *Pur enginer (ou engingner) le court ou la partie.*] That is, to beguile the court, or the partie, as by the examples before expressed have appeared.

And this artificiall deceit is of all other the worst, for hereby the matter is so tricked, shadowed, and heightened by colour of painted art, as thereby the judges themselves are abused and beguiled,

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(5) *Eit la prisonment dun an, & ne soit eye en la court le roy a counter pur nulluy.*] This punishment extends as well to the apprentice, as to the serjeant.

(6) *Scit a volunt le roy.*] These words are before expounded, cap. 4. &c.

Tr. 18 E. 1. in
B. Rot. 168.
warr.

William de Wasthill plaintife against Matthew of the exchequer, in an action of deceit, and declared, that where he had demised to the said Matthew certain lands in Wyrlyngscote, in the county of Worcester, and Blakgreve in the county of Warwick for the terme of twelve yeares, and covenanted by fine to assure the same, the said Matthew other lands in the said fine fraudulently did insert, to have and to hold to him in fee, to the disherison of the plaintife, &c. This matter was treated of, and examined by all the judges of England, and the treasurer and barons of the exchequer in the presence (saith the record) of Henry de Lacy earle of Lincoln, master William de _____ bishop of Ely, and Robert of Tipetet, and others: and, to use the words of the record, *Super examinationem tam ipsius Matthæi quam recorderum, compertum est, quod hæc et alia perpetravit in deceptionem curiæ*: and thereupon judgement is given, *Quod committatur gaolæ ibidem moratur per unum annum et unum diem secundum * statutum, et finis † cessetur.* 'The quashing of the fine was by force of these words in this statute, *Et si le reffas demand greinder paine, soit a volunt le roy*, that is, of the kings court, where the plea dependeth.

* W. 1. ca. 25.

† Nota hoc.

Not. Six judges
in the court of
Common Pleas.
Mich. 33 E. 1.

Hæc est finalis concordia facta in curia domini regis apud Westm' a die Sancti Michaelis in xv. dies, anno regni regis Edwardi filii regis Henrici tricesimo tertio, coram Radulpho de Hengham, Willielmo de Bereford, Elia de Bekingham, Petro Malore, Willielmo Howard, & Lamberto de Trykingham iussic', & aliis domini regis fidelibus tunc ibi presentibus, inter Rogerum de Gamages, & Ceciliam uxorem ejus querentes, & Iohannem filium Iohannis de Ballingham defore' de duabus messuagiis, quinquaginta & duabus acris terræ, & una acra besci, & divid' un' acræ pasturæ, & medietate minus acræ prati, cum pertinentiis in Ballingham, unde placitum conventionis summonitum fuit inter

Placit' convent'.

cos

eos in eadem curia, scilicet quod prædictus R. recogn' prædicta tenementa cum pertinentiis esse jus ipsius Iohannis. Et pro hac recognitione, sine & concordia, idem Iohannes concessit prædictis Rogero & Cecilia prædicta tenementa cum pertinentiis, & illa eis reddidit in eadem curia. Habend' & tenend' ejisdem Rogero et Cecilia, & hæredibus ipsius Ceciliae de capitalibus domini feodi illius per servitia quæ ad tenementa pertinent imperpetuum. Et præterea idem Iohannes concessit pro se & hæredibus suis, quod ipsi warrant' ejisdem Rogero & Cecilia, & hæredibus ipsius Ceciliae, prædicta tenementa cum pertinentiis contra omnes homines imperpetuum. Et pro hac recognitione, redditione, warrant', sine & concordia iidem Rogerus & Cecilia dederunt prædicto Iohanni viginti libr' sterlingorum.

A render to Cecilie, which was not party to the consens.

Hil. 7 E. 2. coram rege. rot. 93. Hereford.

This fine being removed coram rege; the heires of John Ballingham, viz. Cecile the wife of Roger Burghull, and her husband, and Sibyl and Cecilie daughters and heires of Margerie, brought a writ of deceit, &c. for the avoiding of the fine: asserentes (saith the record) prædictum finem minus ritè esse levatum in deceptionem curiæ regis, et in exheredationem hæredum prædict', eo quod prædicta tenementa in prædict' fine contenta sunt de manerio de Ballingham, quod est de antiquo dominico coronæ Angliæ. Afterwards Roger and Cecilie his wife upon their default were seivered, and Sibyl and Cecilie sued forth, and prayed that the fine for the cause aforesaid, revocetur et penitus annulletur, and the court in this case resolved thus, Et quia videtur curiæ quod præd. Sibilla et Cecilia filiæ præd. Margeriæ ad breve suum præd. responder' non debent, eo quod prædict' Iohannes filius Iohannis antecessor earundem, &c. si modo vixisset ad præd. finem annulland. admitti non debuit: and yet the record proceedeth for the punishment of the deceit to the court in these words, Quæsitum est à præfatis Rogero de Gamages, et Cecilia uxore ejus, quid respondeant ad deceptionem et collusionem curiæ domini regis præd. &c. qui dicunt quod præd. tenementa in prædictio sine contenta sunt ad communem legem placitabilia, et semper à tempore, quo non extat memoria hucusque, &c. et non per breve clausum de reço, &c. eo quod non sunt de antiquo dominico, &c. et de hoc pon' se * super patriam, &c. Ideo ven' inde jurata coram rege à die Paschæ in quindecim dies ubicunque, &c.

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Vide 17 E. 3. 31.
30 E. 3. 22.
8 Aff. 35.
8 H. 6. 11.
The writ of Deceit is to bee brought by the lord for the annulling and revoking of the fine, but the court may punish the deceit to the court, at the suit of the party or his heires.
* 17 E. 3. 31.

There is a chapter added amongst the acts made in W. 2. anno 13 E. 1. the last chapter saving one in these words, chauncellor, treasurer, justices, ne nul del conseil le roy, ne clerk de la chauncery, ne del eschequer, ne de justice, ne dauter minister, ne nul del hostile l' roy ne clerk, ne lay, ne puit recevoir esglise, ne adworson de esglise, ne t're ne tenement en fee per donc, ne per achate, ne a ferme, ne a champerty, ne en auter maner, tanque come le chose est en plea devant nous, ou devant ul de nous ministres, ne nul lorver ent soit prise, &c.

It is certain that this chapter was not enacted in 13 E. 1. therefore it is to be seen when it was made a law.

First, Fleta coupleth the 25 chapter of this parliament of W. 1. and the said chapter inserted into W. 2. together; whereby it seemeth that it was made at this parliament.

Fleta ubi supra.

2. It is enacted in the French tongue, as this statute of W. 1. is, and all the rest of the statute of W. 2. is in Latine.

3. It hath the same phrased and manner of penning that the 25. and 29. chapters of this act of W. 1. hath.

4. The statute of champerty made in the 11 yeare of E. 1. (which was before the statute of W. 2.) reciteth the effect of this chapter,

Stat. de Champ. anno 11 E. 1.
Vet Mag. Cha. fo. 30. b.

chapter, and the 29 chapter of the parliament of W. 1. for by the said act of 11 E. 1. it is recited, *Come contenue soit in nostre estatute, que nul de nostre court preigne plea a champerty per art ne per engin'*; which is a summary recitall of the said act inserted, as is afore-said, amongst the statutes of W. 2. for the chauncellor, treasurer, justices, &c. are all of the kings courts, and it was fitter to rehearse them generally, then by particular names.

And further, the said act of 11 E. 1. reciteth this 29 chapter concerning counters, attourneyes, and apprentices, and others, as Fleta doth, rather by way of explanation, then in the same words.

5. There is no one act in W. 1. so general as this rehearsefall in the 11 E. 1. is, for the 25 chapter is *nul minister*, and this is *nul generalment* without limitation.

6. Mention is made in the recitall of the said act of 11 E. 1. of officers *à hauts homes* & *autres de la terre*, and in no statute before that, any mention is made *des hauts homes*, that is, of the chauncellor, treasurer, the kings counsellors, &c. but onely in this act, which is inserted amongst the statutes of W. 2.

7. And where by the 28 chapter, provision was made against the clerks of the king, and of the justices, and by the 29 chapter against serjeants, apprentices, attournies, and others, it had been a great omission and defect in the makers of these laws, to have left out the great officers and justices themselves of the kings courts, and others recited in this act inserted in W. 2. against whom it was more necessary to provide, then against the other, because they had more power to offend; and the law had not seemed equall, if provision had not been made as wel against the majorities, as the minorities, the great, as the small.

8. The said act inserted into W. 2. inflicteth punishment (*a la volunt le roy*) the act of 11 E. 1. doth adde hereunto three years imprisonment, for *dignitas personæ auget pœnam*.

En fee.] That is, in fee simple.

Per done.] That is, by a gift in taile.

Ne per achate.] That is, by purchase for mony or other consideration.

Ne a ferme.] That is, by lease for life, or for yeares.

Ne a champerty.] This hath beene explained before, chap. 25.

Ne en autre manner.] These be generall words, and forbid all purchases *pendente placito* by the persons named in this act; which is worthy of observation, to make a diversity between these persons herein named, and others: see before cap. 25. and note well the books there quoted.

A volunt le roy.] This is explained before cap. 4. &c.

Auxibien celui que purchase come celui que le fra.] Note the punishment lieth by this act equally, as well upon the giver as the taker.

Vide W. 2. cap.
49. Stat. de. 33
E. 1. De conspi-
racy, Vet. Mag.
Gart. fo. 111. b.

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CAP. XXX.

ET pur ceo que multz des gents se pleignent des serjeants (1), criours de fee (2), et les marshals des justices (3) en eire, et [dauters justices] quelles pernent a tort deniers de ceux queux recoveront seisin del terre, ou queux gaignont lour quedeles, et de fine levie, et des jurors, villes, prisoners, et des auters attaches en ples de la corone, auterment que faire ne duissent, en muts des maners, et de ceo quil ad plus grand number de ceux que estre ne duist (4), per que le people est malement greve; le roy defende, que cestes choses ne soient disformes faits. Et si ull serjeant de fee le face, office soit prise en le maine le roy. Et si marshals des justices le facent, soient punis grevement a la volunt le roy. Et a tous les plainitifs lun et l'auter rendre le trebie de ceo quels aver' prise en cel maner.

AND forasmuch as many complain themselves of officers, cryers of fee, and the marshals of justices in eyre, taking money wrongfully of such as recover seisin of land, or of them that obtain their suits, and of fines levied, and of jurors, towns, prisoners, and of others attached upon pleas of the crown, otherwise than they ought to do, in divers manners; and forasmuch as there is a greater number of them than there ought to be, whereby the people are sore grieved; the king commandeth that such things be no more done from henceforth; and if any officer of fee doth it, his office shall be taken into the king's hand; and if any of the justices marshals do it, they shall be grievously punished at the king's pleasure; and as well the one as the other shall pay unto the complainants the treble value of that they have received in such manner.

Vide Mirror, c. 5. § 4. Britton 37. b. (11 Ed. 4. 3. b. 4 Inst. 101.)

(1) *Serjants.*] Fleta rendreth these words thus, *virgatores serwientes*, they were called *virgatores à virgis*, of white rods, which they carried in their hands before the justices in eyre and other justices. Flet. li. 2. c. 32. de Virgatoribus. [219]

(2) *Criours de fee.*] It appeareth by Fleta that these are comprehended under the generall name of *virgatores*, and therefore carried rods also, he rendreth these words *clamatores de feodo*. Fleta ubi supra.

(3) *Et les marshals des justices.*] *Justiciarium mareschalli*. Fleta ubi supra.

(4) *Et de ceo que il ad plus nombre que estre ne duist.*] Hereby it appeareth, that the over-great number of these virgers, criers, and marshals, was a meanes of extortion, or grievance of the people; and so it is in all other cases of what profession or place soever, *Multitudo imperatorum perdidit cariam*: besides it taketh away the estimation and credit of the same.

C A P. XXXI.

DE ceux queux parnent outragious tolnet' (1), enconter common usage du realme en la ville merchandie (2): purview est, que si ull le face en la ville le roy mesme, que soit bail' a fee farme, le roy prendra le franchise (4) del marche (3) en sa maine. Et si soit auter ville, et ceo soit fait per le seigniour de mesme la ville (5), le roy le fra per mesme le maner. Et sil soit fait per le bailife sans le commandement le seigniour, il rendra al plaintife au tant pur le outragious prise, come il avoit prise de luy, sil ust import son tolne: et il avera prison del xl. jours. Des citizens, et des burgeses a que le roy ou son pere ad grant murage pur lour villes enclofer (6), et que tiel murage parnent auterment que lour est grantie, et de ceo soient attaintes: purview est, que ils pardent cel grant de tous le temps (6) que serra a vener, et serront en le grievous mercy le roy.

TOUCHING them that take outragious toll, contrary to the common custom of the realm, in market-towns; it is provided, that if any do so in the king's town, which is let in fee-farm, the king shall seise into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner; and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more for the outragious taking, as he had of him, if he had carried away his toll, and shall have forty days imprisonment. Touching citizens and burgeses, to whom the king or his father hath granted murage to enclose their towns, which take such murage otherwise than it was granted unto them, and thereof be attainted; it is provided, that they shall lose their grant for ever, and shall be grievously amerced unto the king.

Mag. Chart. c. 30. W. 2. cap. 25.

In the troublesome and irregular raigne of H. 3. outragious tols were taken and usurped in cities, boroughs, towns, where faires and markets were kept, to the great oppression of the kings subjects, by reason whereof very many did refraine from the coming to faires and markets, to the hindrance of the commonwealth; for it hath ever been the policy and wisdom of this realm that faires and markets, and specially the markets, be well furnished and frequented.

(1) *Tolnet.*] *Toll.* For the generality of the word, see *Jehu Webs case*, lib. 8. *Magna Charta*, and *W. 2.* whereof, and of the severall kinds thereof, more shall be said in the exposition of the statute of *W. 2.* for that here it is restrained, as hereafter appeareth.

Outragious.] That is, either where a reasonable toll is due, and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped, for it is an outrage to doe such a common injury and wrong; sometime it is called *superfluum, vel indebitum, vel injustum.*

Lib. 8. fol. 46.
Mag. Chart.
ubi sup.
W. 2. ubi sup.
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Vide ca. 36. for this word.

Cap. Itin' Vet.
Mag. Chart.

No

No toll is due either on the part of the lord, when he hath a faire or market, and not any toll; or on the part of the merchant, who ought to be discharged of toll, or of the thing sold that is not tollable.

(2) *En la ville merchandie.*] That is, in a city, borough, or town of merchandize, where faires and open markets are kept, for merchandizing, and buying and selling.

This is intended of toll to the faire or market, whereof we will only speak in this place.

Toll to the faire or market is a reasonable summe of money due to the owner of the faire or market, upon sale of things tollable within the fair or market, or for stallage, picage, or the like.

And this was at the first invented, that contracts might have good testimony, and be made openly; for of old time, privy or secret contracts were forbidden, and the Mirror said truth, for the auncient law was, *Negotiator in vulgo si quid mercatus fuerit in eam rem testimonia habeto; nemo extra oppidum, nisi presente preposito aliusve fide dignis hominibus, quicquam emito.* And another, *Ne quis extra oppidum quid emat*; in these laws *oppidum* is taken for faire or market.

And again the same king, *Si quis testatò rem aliquam mercatus fuerit, quam alius deinceps quisque suam esse contenderit, eam venditor præstet, atque in se recipiat, siue is servus siue ingenuus fuerit: die autem dominico nemo mercaturam facito; id quod si quis egerit, et ipsa merce, et 30. præterea solidis mulctator.*

Here note by the way two things, first, the antiquity of the law for changing of property, according to these auncient laws, and therefore to this day it is called, *apertum forum*, or *apertus mercatus*, an open market, or market overt; and secondly, that no merchandizing should be on the Lords day.

Bonorum (sine fidejussione, et testimonio) emptio, aut permutatio non esto.

Si quis testibus non adhibitis quicquam fuerit mercatus, idemque alter uti suum ipsius proprium vendicaret, emptori nulla fiat ad-vocandi potestas, verum is domino rem reddito, &c. Which I have recited for the confirmation of the Mirror, and for the honour of venerable antiquity.

Every one, that hath a faire or market, ought to have it by graunt or prescription; if the king graunt to a man a faire or market, and graunt no toll, the patentee shall have no toll, for toll being a matter of private for the benefit of the lord is not incident to a faire or market so graunted without a speciall graunt, as it was adjudged in the case of Northampton, for such a faire or market is accounted a free faire or market; and there it was also resolved, that after such a graunt made the king cannot graunt a toll to such a free faire or market without *quid pro quo*, some proportionable benefit to the subject. Lastly, it was there resolved, that if the toll graunted with the faire or market bee outrageous or unreasonable, the graunt of the toll is void, and that the same is a free market or faire.

But if the king graunt unto one a faire or market, he shall have without any graunt a court of record, called a court of pipowdres *, as incident thereunto, for that is for advancement and expedition of justice, and for the supporting and maintenance of the faire

Flet. li. 2. c. 43.
& li. 1. ca. 20.

Bracl. li. 2. 56,
57.
*Forum, nundinæ,
feria, mercatus,
oppidum.*

Cap. 1. § 3.
Inter leges
Inæ regis.
Inter leges
Ethelstani regis.

Inter leges
Etheldredi regis.

Inter leges Ca-
nuti regis.

Mich. 39 & 40.
Eliz. Cor. Rego.

* [221]
Bracl. l. 5. c. 334.
17 E. 4. c. 2.
1 R. 3. c. 6.
7 E. 4. 23.
or 13 E. 4. 8.

7 H. 6. 18, 19.
13 H. 7. 19. b.
Dier 3 Mar.
132, 133.
* 9 H. 6. fo. 45.
tit. toll 7.

or market; and so note a diversity between the private and the publique.

* No toll for any thing tollable brought to the fair or market to be sold, shall be paid to the owner of the faire or market before the sale thereof, unlesse it be by custome time out of mind used, which custome none can challenge that claime the faire or market by graunt within the time of memory, viz. since the raigne of king R. 1. which is a point worthy of observation for the suppression of many outrageous and unjust tolls inroached upon the subject to be punished within the purview of this statute. So note, it is better to have a faire by prescription, then by graunt.

2 & 3 P. & M. c. 7.
31 Eliz. ca. 12.
9 H. 6. 45.

Also if the lord or owner of the faire or market doe take toll of the seller of horses, &c. he is to be punished within this statute, for he ought to take it of the buyer onely. Vide 2 & 3 Ph. & Mar. & 31 Eliz. And so *de communi jure* no toll shall be paid for things brought to the faire or market, unlesse they be sold, and then toll to be taken of the buyer; but in ancient faires and markets toll may be paid for the standing in the faire or market, though nothing be sold.

Bract. li. 2. f. 57.
3 E. 3. ass. 445.
14 E. 3. Barr.
177. 16 E. 3.
grant 53. 39 E.
3. 13. b. 41 E.
3. 24. 43 E. 3.
29. 44 E. 3. 20.
F. N. B. 94. f. &
227.

If the king or any of his progenitors have granted to any to be discharged of this toll either generally or specially, this grant is good to discharge him of all tolls to the kings owne faires or markets, and of the tolls, which together with any faire or market have been granted after such grant of discharge, but cannot discharge tolls formerly due to subjects, either by graunt or prescription.

Bract. fo. 56. a.
& 57. b.

Hereof Bracton said, *In omni libertate concessa, &c. erit prioritas præferenda.* And againe, *Esse enim poterit libertas, ut si quis teneatur ad dandum ex servitute, sicut theolonium et consuetudines, ex libertate defendi poterit ad non dandum, item si ex servitute teneatur quis ad non capiendum, ex libertate concessa capere possit consuetudines et theoloniam.*

7 H. 4. 4.
9 H. 6. 25.
F. N. B. 228. d.
Regist.

Tenants in ancient demesne, for things comming of those lands shall pay no toll, because at the beginning by their tenure they applyed themselves to the manurance and husbandry of the kings demeans, and therefore for those lands so holden, and all that came or renewed thereupon, they had the said priviledge: but if such a tenant be a common merchant for buying and selling of wares or merchandises, that rise not upon the manurance or husbandry of those lands, he shall not have the priviledge for them, because they are out of the reason of the priviledge of ancient demesne, and the tenant in ancient demesne ought rather to be a husbandman then a merchant by his tenure, and so are the books to be intended. And herewith agreeth an ancient record, the effect whereof is, *Quod hii qui clamant esse immunes de thecolonio præstando, ut tenentes in antiquo dominico, vel per chartas regum, non debent distringi pro aliquo thecolonio pro merchandiziis ad usus suos proprios emptis; imo pro merchandiziis quæ emerint vel vendiderint ut mercatores, debent solvere pro eis.*

Hil. 14 E. 1.
corâ rege rot. 41.
Devon.

Rot. Parl. an. 18
E. 1. fo. 2. int.
Abbatem loci
sancti Edw. &
Balivos de
Southampton.

King H. 3. did grant to the abbot of L. and his successors, *Quod ipsi et homines sui sint quieti ab omni thecolonio in omni foro et in omnibus nundinis, &c.* And there it is resolved, that the abbot should have this priviledge by force of this generall graunt in this manner, *Quod ipsi et homines sui sint quieti à præstatione thecolonii in venditionibus*

ditionibus et emptionibus pro suis necessariis, ut in victu, vestitu, et similibus, et hoc ad opus proprium ipsius abbatis et hominum suorum.

Mich. 2 E. 2.
coram rege pro
mercato de
Brimmingham
acc^t.

* 35 H. 6. 57.

• The king shall not pay toll for any of his goods, and if any be taken, it is punishable within this statute.

(3) *Marche.*] This word doth here include as well a faire as a market; for *forum*, from whence faire is derived, signifieth both: and a mart is a great faire holden every yeare, derived à *merce*, because merchandises and wares are thither abundantly brought: and *mercatus* is derived à *mercando*.

(4) *Prendra le franchise.*] That is, shall seise the franchise of the faire or market untill it be redeemed by the owner: but this is intended upon an office to be found, for in statutes incidents are ever supplied by intendment.

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(5) *Seignior de mesme la ville.*] That is, the owner of the faire or market.

Fleta collecteth the effect of this former part of the act in these words, *Inhibitum est ne quis in villis regis merchandis, quæ dimissæ sunt et commissæ ad feodi firmam, indebita et injusta capiat theolonia; quod si quis fecerit, extunc eo ipso capiet rex libertatem mercati in manum suam; eodem modo facit rex, licet in alterius villa præmissa fieri contigerit, si balivus hoc fecerit sine voluntate domini sui, reddet tantum querenti, quantum cepisset balivus ab eo, si tolnetum asportasset, et nihilominus habeat prisonam 40. dierum.*

Flet. li. 2. c. 43.
versus finem.

Here I perswade my selfe some would desire to know, what is due for toll to the faire or market: to which I answer, that I can tell what was due of old, and what was ordained in times past by ancient kings to be paid: for the Mirrour saith, *Que faïres et markets se fissent per lieus, et que achators de blee, et beaſts donaſſent toll a les bailifes des seignours de markets, ou de faïres, cestascavoir maile de dix sours de biens, et de meynes, meynes, et de plus, plus al afferant, issint que nul tol passast un denier de un maner de merchandize, et cest tolle fuit trouve pur testmoiner les contraitz, car cheſcun pri-vie contrait fuit defendue.* But at this day there is not one certaine toll to the market taken, but if that which is taken be not reasonable, it is punishable by this statute, and what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them

Mirror, c. 1. § 3.

(6) *Murage pur leur villes incloſer.*] *Muragium*, à *muro*, as our act doth explaine it, to wall in, or inclose with wall a towne, under which word is here included a city and burghe.

Cap. Itin. ubi
sup. 3 E. 3. aff.
445. 13 H. 4.
17. a. Rot. pat.
12 E. 3. 1. part.
m. 30. Harwich.
Rot. pat. 8 R. 2.
1. part. m. 35.
Salop. m. 38.
Yarmouth.

Murage is a reasonable toll to be taken of every cart, wayne, horse laden coming to that towne, for the inclosing of that towne with walls of defence, for the safegard of the people in time of war, insurrection, tumults, or uprores, and is due either by grant or by prescription.

* Flet. li. 1. c. 42.
a 3 E. 3. & 13 H.
4. ubi sup. Rot.
pat. 1 E. 2. m. 17.
de transuentibus
subtus pontem
Londō. Rot. pat.
12 H. 6. m. 18.
1. part. Reg. 259.
F. N. B. 227.
b Rot. pat. 10
E. 3. m. 32.
Henley 2. part.
Rot. Pat. 1 E. 2.
1. part. m. 1.
Gainsburgh.
F. N. B. 227.
Regist. 259.
c Rot Pat.
1 E. 3. m. 10.

But if a wall be made, which is not defensible, nor for safegard of the people, then ought not this toll to be paid, for the end of the graunt or prescription is not performed.

• He that hath burghbote granted to him, is discharged of murage granted afterwards: and although murage be here particularly named, yet are graunts of like nature within the purview of this statute: as,

- a Pontage.
- b Paviage.
- c Keyage, &c.

(6.) *Pardent*

^d 22 ass. p. 34.

39 H. 6. 32.

20 E. 4. 6.

2 H. 7. 11.

^e Bract. l. 2. f. 56.

Lib. 3. fo. 117.

Flet. li. 1. c. 20.

Ca. Itin. ubi sup.

(6) *Pardent cel graunt de tous temps.*] Here the whole franchise is forfeited, and so note a diversity betweene *prendra la franchise*, &c. and *pardent cel graunt*, the one implying a seisure, as hath been said, and the other a forfeiture for ever, ^d for it is a misuser, or abuser: ^e and thereof Bracton saith, *Hujusmodi autem libertates, &c. statim quasi transferuntur, et quasi possidentur, &c. donec amiserit per abusum, vel non usum.*

It is to be observed, that *consuetudines* hath severall significations in law: for sometime it signifieth custome, which doth include all manner of tolls: and therefore Bracton saith, *De novis consuetudinibus levatis sive in terra, sive in aqua, quis eas levavit, et ubi*: so called, because they colour things so taken under pretext of prescription or custome, where there is none at all: and therefore here they are called *novæ consuetudines*, because they were new tolls or exactions, under the visard of antiquity.

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Flet. li. 2. c. 43.

Fleta rendreth this last part of this chapter in these words: *Item qui muragium ad villam claudendam gravius ceperint, quam concessum fuerit per cartam regis, perdant extunc gratiam suæ concessionis, et graviter amercientur.*

Cap. Itin. ubi sup.

And presently after the making of this act, the effect thereof for justices in eire to enquire of it, was inserted in the chapters or articles of the eire in these words: *Item de hiis qui ceperunt superflua vel indebita tolmeta in civitatibus, burgis, vel alibi contra communem usum regni: item de civibus et burgensibus qui de muragio per dominum regem eis concessio, plus ceperunt quam facere deberent, secundum concessionem domini regis factam.*

Mirr. c. 5. § 4.

The Mirrour saith, touching murage, thus: *Le point que voet que ceux que misurent murages les perdent ne fuit mistier d'aver estre, car ley voet que chescun perdra son franchise que misurera*: so as this statute was made in that point for two purposes, viz. to affirme the common law, and to adde a farther punishment, viz. to be grievously amerced.

C A P. XXXII.

DE ceux queux pignent vitaille (1), ou nul riens al oeps le roy a creance, ou a garrison du chasell, ou aylors, et quant ils ont receve le paiement al exchequer, ou en garderobe, ou aylors, detaignont le payment des creanciers, a grand damage de eux, et en esclander du roy: purvieu est, de ceux queux ont terres ou tenements, que maintenant soit ceo leve de leur terres ou de leur chateaux, et paies as creanciers, ove les damages queux ils averont ewe, et soient rentes pur le trespas, et s'ils neient terres ne tenements, soient en le prison a la volunt le roy. De ceux que

OF such as take victual or other things to the king's use upon credence, or to the garrison of a castle, or otherwise, and when they have received their payment in the exchequer or in the wardrobe, or elsewhere, they withhold it from the creditors, to their great damage, and slander of the king; it is provided, for such as have lands or tenements, that incontinent it shall be levied of their lands, or of their goods, and paid unto the creditors, with the damages they have sustained, and shall make fine for the trespass; and if they have

no

que pernent (2) part des detts le roy (3), ou auters louers pernent des creanzors le roy, pur faire le payment des mesmes celles detts: purview est, quils rendent le double, et soient punies grevement a la volunt le roy. Et de ceux queux parnent chivals (4), ou charettes a faire le cariage le roy, plus que mestier serroit, et parnent louers pur [relesser] ses chivals, ou les charettes. Purview est, que si ul de la court le face, il serra grevement chastice per les marschals, et si ceo soit fait hors de la court, [per un del court] ou per auter que de la court, et il [ent] soit attainnt, il rendra le treble, et serra en le prison le roy per xl. jours.

no lands nor goods, they shall be imprisoned at the king's will. And of such as take part of the king's debts, or other rewards of the king's creditors for to make payment of the same debts; it is provided, that they shall pay the double thereof, and be grievously punished at the king's pleasure. And of such as take horse or carts for the king's carriage more than need, and take rewards to let such horse or carts go; it is provided, that if any of the court so do, he shall be grievously punished by the marshals; and if it be done out of the court, or by one that is not of the court, and be thereof attainted, he shall pay treble damages, and shall remain in the king's prison forty days.

(28 Ed. 1. c. 2. 21 R. 2. c. 5. 28 H. 6. c. 2.)

[1] *De ceux queux parnent vitaille.* Concerning this point of purveyance, we shall refer the reader to Magna Chart. cap. 21. and shall say no more concerning that matter for three causes: 1. For the text of this law is evident. 2. For that there have been many excellent statutes made concerning purveyours, and purveyance, in all to the number of 48, which are fully and plainly penned, one of them being a good exposition and enlargement of another. 3. I find no book case, nor any report for the exposition either of this or of any of the said statutes, which (to say the truth) had more need of execution then exposition: and therefore either the purveyours have been so honest and just dealing men, as they seldom or never offended; or else they have had either so good friends, or so good hap, as their offences have been covered, or not imputed to them.

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[2] *De ceux queux parnent part des detts le roy.* The mischiefs before this statute were, first, that in the reign of king H. 3. the king's officers, that had charge of his treasure and revenue, or their agents would, in respect of his troubles and expences, pretend to those, to whom the king was indebted, that the king's coffers were empty, and thereupon paying part to the king's creditors, compounded for their whole debts, and took their acquitances for the whole, and converted the residue to their owne use.

The second was, that sometime they would craftily pay the whole, and take a great reward therefore, which was dishonourable to the king, damage to the creditors, and corrupt dealing in those officers, or their agents.

This act is generall against all those that take part of the king's debts, or other reward of the king's creditors, for payment of the same debts. This law doth provide, that he that so doth, shall render double to the party grieved, and shall be punished grievously at the king's will.

II. Instr.

S

This

This act is in affirmance of the common law; onely it addeth a greater punishment.

Rot. Parl.
50 E. 3. nu. 17. Richard Lions merchant of London, and farmor of the kings customes and subsidies was adjudged in parliament for buying debts of divers men, due by the king, for small values, and for taking of bribes, to pay to the kings creditors their due debts, to be imprisoned at the kings will, and all his lands, tenements, and goods to be seised to the kings use, which proveth it an offence or misdemeanour against the common law, for the judgement was not given according to this act.

Rot. Parl.
50 E. 3. nu. 34. John Lord Nevill, while he was one of the kings privy counsel, bought divers debts due by the king, namely, of the lady of Ravensholme, and Simon Love merchant, far under the value: the lord Nevill being herewith charged in parliament, confessed that he received of the said lady 95 l. which she gave him of her own good will for the obtaining of her debt: for this (amongst others) he had judgement of imprisonment at the kings will, and that his offices, lands and goods should be seised into the kings hands, and to make restitution to the executors of the lady (who then was deceased) of the said 95 l.

See for these words before,

cap. 19.

Cap. Itin.

Vet. Mag. Char.
155.

Mirr. c. 1. § 5.

Cap. 5. § 4.

(3) *Detts le roy.*] See for the exposition of these words before, ca. 19.

Cap. Itineris doth render this clause thus: *Et similiter de hiis qui partem ceperunt debitorum domini regis, vel alia munera, ut de residuo creditoribus satisfacerent.*

To conclude this point, the Mirrour saith, *In perjurie vers le roy pechent ceux ministres, queux rien de paierent des detts le roy, selonc; ceo que enjoinne leur fuit a faire, ou rendant parti pur satisfaction del entier, et ne rendant au roy le remnant.*

(4) *Et de ceux queux parnent chivals, &c.*] This article concerns purveyances, and purveyors; and therefore for the causes before rehearsed, no more shall be said hereof in this place.

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C A P. XXXIII.

PURVIEW est, que nul vicount ne suffer barretors (1), ne maintainours des parols en counties (2), ne seneschalles des grandes seigniours, ne des auters (que ne soit attorney son seignour) a [la] fuit faire, ne render les jugemens des counties, ne prononcer les jugemens [ou assenter de faire les justicements (3)] sil ne soit especialment prie et requise de tous les suitors, et les attorneyes des suitors, queux seront a la journe (4). Et si ul le face, le roy se prendra grievousement al vicount, et a luy.

IT is provided that no sheriffe shall suffer any barretors or maintainers of quarrels in their shires, neither stewards of great lords, nor other (unless he be attorney for his lord) to make fuit, nor to give judgements in the counties, nor to pronounce the judgements, if he be not specially required and prayed of all the suitors, and attorneyes of the suitors, which shall be at the court, and if any do, the king shall punish grievously both the sheriff and him that so doth.

(8 Co. 36.)

Where

Where by the statute of Merton it is provided, that every free suitor of the county, &c. might freely make his attourney to doe these suits for him.

Merton, ca. 10.
See there the
exposition
thereof.

Now by colour hereof two mischiefs did arise.

1. That barretors and maintainers of querels were by the sherriffe countenanced to be attorneys to make suit, and amongst the suitors to give judgements in the counties, and sometime pronounce judgement in the name of the suitors.

2. That stewards of great lords, and of others, who had no letters of attourney, according to the said statute of Merton would doe the like: This act doth remedy both these mischiefs, as by the letter hereof appeareth.

(1) *Barretors.*] For the word and the sense thereof, see lib. 8. fol. 36. in the case of barrettry.

Li. 8. fo. 36. in
the case of bar-
rettry. See the
first part of the
Init. 701. sect.

(2) *En counties.*] That is, in the county court, for there the suitors be judges.

(3) *Justicements.*] That is, all things belonging to justice.

(4) *A la journe.*] That is, at the court.

C A P. XXXIV.

PUR ceo que plusors sont souvent troves in counte (1) controours (2) des nouvelles, dont discord (3), ou manner de discord (4) ad estre souvent enter le roy et son people, ou [ascuns de] les hautes homes de son roialme: defendu est pur le damage que ad estre (5), et que uncore ent purra avenir, que desormes nulle ne soit cy barde de dire, ne de counter nulles faux nouvelles, ou controvor (6), dont discord, ou manner de discord*, ou esclauder puit surdre entre le roy et son people, ou les hautes homes de son roialme (7). Et qui le fra soit pris, et detenus in prison jesques a tant que il cit trove en court celui dont la parol serra move (8). 2 R. 2. cap. 5.

* [226]

FORASMUCH as there have been oftentimes found in the country devisors of tales, whereby discord, or occasion of discord, hath many times arisen between the king and his people, or great men of this realm; for the damage that hath and may thereof ensue, it is commanded, that from henceforth none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander may grow between the king and his people, or the great men of the realm; and he that doth so, shall be taken and kept in prison, until he hath brought him into the court, which was the first author of the tale.

(1) Leon. 237. Dyer 155. 12 Rep. 133. 1 Roll 444. 3 Bulstr. 225. 2 R. 2. stat. 1. c. 5. 12 R. 2. c. 11. 1 & 2 Ph. & M. c. 3. 1 El. c. 6.)

The offences, viz. false reports and news punishable by this law are forbidden by the law of God:

Thou shalt not have to do with any false report, neither shalt thou put thy hand to the wicked to be an unrighteous witnesse.

Exodus 23. 1.

For they which gladly heare false reports and newes, will be also as ready to publish them.

Ep. Jude. ver. 8.
ver. 10.
Exod. 22. 28.

Against those that despise rulers, and speak evill of those that be in authority, and against those that speake evill of those things which they know not: *judicibus non detrabes, et principi populi non maledices*: thou shalt not raile of the judges, nor speak evill of the ruler of the people.

Before this statute, in the raigne of king H. 3. two kinde of persons were authors of great discord and scandall in two severall degrees; first, men that did raise and imagine, out of their own heads, false bruits and rumours, and others that reported and spread the same, whereby discord and scandall was oftentimes so kindled, sometime between the king and his commons, and other times between the king and his nobles, the great men of the realm, as they wrought privy discontentment, that produced publique discord and scandall, wherof our act speaketh; which scandall and discord appeared in many parliaments between the king and his commons, and between the king and his lords of parliament, and especially in those two parliaments, the one in 21 H. 3. when *Magna Charta* was confirmed, and the other in 42 H. 3. holden at Oxford, which in story is called *insanum parliamentum*; and this discord and scandall did oftentimes in the raigne of that king break out into fearfull and bloody warres and rebellions according to that old observation, *Improbi rumores dissipati sunt rebellionis prodromi*, which fully appear in our histories warranted by good record, and is implied in this act in these words; "Forasmuch as there hath been oftentimes found devisors and reporters of rumors, &c. whereby discord hath many times arisen between the king (meaning H. 3.) and his people, or the great men of the realm." And amongst all those rebellions in those dayes, those at Lewes in Suffex and Evesham in Worcestershire were most fearfull, bloody, and dangerous, for at Lewes, the king himself manfully fighting, *confesso ex utroque latere equo capitur cum Richardo rege Almarorum fratre suo, et Edovardo principe filio, &c.* And at Evesham, Simon Mountford earle of Leicester (our English Cataline) *instruit aciem impeditentis ex acie remotis, ac in fronte aciei ponit Henricum regem, quem secum captivum ducebat, atque suis armis induit, ut si fortuna adversa sit, dum ille imperatoris personam gerens ab hoste petitur, ipse interim fuga salutis consulere possit: instruuntur contra et hostes et animis et viribus superiores: committitur utrinque pugna, quæ aliquandiu anceps stetit, Henricus inter primos hostium totus non pugnât, sed regem Henricum clamando indicat, quod ei salutis fuit, &c. Quod ubi Simon animadvertit, suos cohortans in medios hostes prorumpit, qui à multitudine circumventus præliando occiditur cum Henrico filio.*

King E. 1. finding by dangerous experience the wofull effects of such false rumors and reports, as is abovesaid, and knowing that the state of every king stood more assured by the hearty and inward love of the subject towards their soveraigne, then by the dread and feare of severe and rigorous laws, did therefore make this law for redresse both for the devising and spreading of such false rumors and bruits in all mild and temperate manner, both for the style and the punishment, rather leaving the same to the censure of the common law (which all men willingly obey) then by inflicting any new devised punishment, which moderation of our king, leaving the punishment to fine and imprisonment, was the greater, for that the auncient law of England before the conquest was much

Polydor Virgil.
lib. 16. p. 312.
anno Dom.
1264, 1265. 43
& 49 H. 3.

much more severe, and rigorous, as by a few examples shall appeare.

Qui falsi rumoris in vulgus sparsi auctor fuisse deprehendetur, leviori aliqua pœna non multator, verum lingua ei præciditor, ni is eam integra capitis sui æstimatione data redemerit.

Int' leges Aluredi regis, ca. 28.
Edgari, ca. 4.

Si quis alium rumoribus dissipatis improba voce lacerarit, quam ob rem, aut corpori ejus damnū inferatura, aut de fortunis imminuatur aliquid, tum si alter audiciones tanquam falsas refellere et coarguere poterit, aut is linguam data capitis æstimatione redimito, aut ei lingua præciditor.

Inter leges Edgari regis, & inter leges Canuti regis.

(1) *En counte.*] That is, in the country or realme.

(2) *Controvers.*] That is, devisors or inventors of their owne head.

(3) *Discord.*] *Discordia.* That is, *dissensio cordium*, dissention of hearts; this grew (as hath been said) to such an height in the reign of H. 3. as that of the philosophicall poet might well be applied to it: (which before is remembred.)

*Impius hæc tam culta novalia miles habebit?
Barbarus has segetes? en quo discordia civis
Perduxit miseros! ———*

Virgil.

Discordes, quasi duo habentes corda.

(4) *Ou maner de discord.*] That is, *latens odium*, privy hatred or discontentment, which is occasion of discord, and whereby men become malecontents.

(5) *Defendu est pur le damage que ad estre.*] This damage or danger you have partly heard before.

(6) *De dire, de counter, ou controvers.*] Two manner of persons are hereby prohibited, the first, those that tell, spread or report false and feigned bruits and rumours under these words, *Dire ou counter*; and secondly, such as devise or invent of their own head the same under this word *controver*: now the persons being described, this statute doth set down generally what those bruits and rumours should be.

(7) *Faux novels, dont discord, ou maner de discord ou dislaunder poet surder enter le roy, & son people ou les hauts homes de son realme.*] Of these false newes, that is, false bruits or rumours, there be five kindes within this act.

1. First, if they be against the king, whereby discord or scandall may arise betweene the king and his commons, signified here by *people*.

2. Against the commons, whereby discord or scandall may be moved between them and the king.

3. Thirdly, against the king, whereby discord or scandall may grow between the king and the peeres, or lords and nobles of the realme, signified here by *les hauts homes de son realme*.

4. Fourthly, against the peeres, or lords, and nobles of the realme, whereby discord or slander may happen betweene them and the king.

5. Lastly, whereby discord or scandall may arise between the king, his lords, and commons.

Quod narratores rumorum qui cedere possunt ad timorem, et tremorem populi, et in dedecus regis et regni, capiantur, et in carcere detineantur, &c.

Tr. 19 E. 2. Rot.
15. Coram rege.

By this record it appeareth of what quality the rumors must be.

By commissions of oyer and terminer power is given to enquire, *De illicitis verborum prepalationibus*; and to punish the same.

Britton, fo. 33.

Britton speaketh of both these kinds of offenders, viz. the devisor, and the reporter, in these words, *De ceux que trouvent, et countent mensoynes del roy, &c.*

Fleta, li. 2. c. 1.

And Fleta saith, *Sunt etiam quedam atroces injuriæ, quæ prisonam voluntariam inducunt, sicut de inventoribus malorum rumorum, unde pax possit exterminari.*

5 R. 2. ca. 6.

1 E. 6. c. 12.

1 Mar. c.

17 R. 2. c. 8.

13 H. 4. ca. 7.

5 Mar. Dier 155.

Oldnolles calc.

The statute of 5 R. 2. punished seditious rumors in an high degree, but that is repealed by 1 E. 6. & 1 Mar.

It was resolved by all the justices, that horrible and slanderous words spoken of queen Mary, were within this statute and punishable hereby, and not by the statutes of 2 R. 2. cap. 5. nor 12 R. 2. cap. 11. for the king, or queene is an exempt person, and not included within these words [*Les hauts, ou grand homes, ou nobles, &c.*]

Cicero pro Clu-
cindo.

Some say that *Rumores dicuntur à ruendo, quia inducunt ruinam*; and true it is that another saith, *Ut mare, quod sua natura tranquilum est, ventorum vi agitur; sic populus sua sponte placatus, hominum seditiosorum vocibus, ut violentissimis tempestatibus, attollitur.*

Dier fo.

13 H. 7. Keyl-

way 28, 29.

F.N.B. 42. g.

2 R. 3. 9.

But it is to be understood, that albeit this statute, and the said act of 2 R. 2. be generall in the negative; yet doe they not extend to all manner of false newes, or horrible and false scandals and lies, &c. for they extend onely to extrajudiciall scandals, &c. And therefore if any man bring an appeale of murder, robbery, or other felony against any of the peeres or nobles of the realme, &c. and charge them with murder, robbery, or felony, albeit the charge be false, yet shall they have no action *de scandalis magnat'*, neither at the common law, nor upon either of these statutes for the bringing of his action, nor for affirming the same to his counsell, attourney, or curster for the framing of his writ, or for speaking the same in evidence to a jury, or for using of those words for the necessary commencement or prosecution of his action judicially; and so it is in an action of forger of false deeds, or any other action whatsoever: for it is a maxime in law, *Que home ne serra puny pur suer des briefes en court le roy, soit il a droit ou a tort*; and the reason thereof is, that men should not be deterred to take their remedy by due course of law; and therefore the statutes never intended to prohibit the suing out of the kings writs, and the proceeding thereupon: and so it is, if in the star-chamber a peere of the realme be charged with forgery, perjury, or the like; but if in the bill the plaintife chargeth him with felony, or any other offence not examinable in that court, that slander is within these statutes, for that the plaintife pursueth not his charge in any judiciall course, seeing the court hath no jurisdiction of the same, and so hath it been adjudged.

F.N.B. 41. g.

22 E. 3. 15. 43

E. 3. 20. tit.

faux judgment

10. 43 Ass. 40.

2 R. 3. 9. 13 H.

7. Keylway 28,

29.

(8) *Soit prise & detenus in prison jesque a taunt que il eit trouve en court celuy dont le parol serra move.*] It hath appeared before, that by the body of the act not onely the tellers and reporters of such false news, but the devisors and inventors thereof are prohibited: but no punishment is inflicted by this act upon the devisor or inventor, for he is left to the common law to be punished by fine and imprisonment according to the quality and quantity of the offence,

which

which is aggravated in respect that it is prohibited by this act of parliament.

And the law is grounded upon the law of God in this point, *Non maledices principi populi.* Deuter. ca. 17.

Nay, in the kings case the secret cogitation of the heart is prohibited, *In cogitatione tua regi ne detrahas* : and the scandals of great men are likewise forbidden, *Et in secreto cubiculi tui ne maledixeris diviti, quia aves cœli portabunt vocem tuam, et qui habet pennas annuntiabit sententiam*; that is, Almighty God will provide means, that such detraction and malediction shall come to light, and be discovered. Ecclesiastes, c. 10.

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Onely this law inflicteth imprisonment upon the reporter, untill he hath found out, and brought into court the author of those false news.

7 E. 1. the king sent commissions to all the counties of England, to enquire *De sparsoribus rumorum*, &c. 25 E. 1. *Declaratio regis missa ad omnes com' Angliæ, de rege purgand' de certis rumoribus iniquis contra ipsum ortis*, &c. Rot. Pat. 7 E. 1. m. 13. Rot. Pat. 25 E. 1. pars 2. m. 7. & Franc. m. 4. Rot. clauf. Vasc. anno 10 E. 3. m. 26.

Rex mandavit maiori & vicecom' London' quod facta inquisitione de sparsoribus rumorum et sedic' in civitate ipsos caperet, et in prîsona de Newgate detineret, &c. In dorf. clauf. anno 20 E. 3. pt. 1. m. 18. & 26.

Vide lib. Intrat. Coke, fo. 302, 303. in false imprisonment.

C A P. XXXV.

DE S hautes homes, et de leur bailifes (1), et des auters (2) (forpris les ministres le roy, as queux speciall authoritie est done de ceo faire (3),) que a le pleint des ascuns, ou per leur authoritie demesne attachent auters ove leur biens trespasantes per leur poier a responder devant eux des contrâits, covenants, ou de trespas faits hors de leur poier, et leur jurisdiction (4), la ou ils ne teignent riens de eux (5), ne deins le franchise (6) ou leur poier est, en prejudice du roy, et de sa corone, et a damage du peole: purview est, que nul desormes ne le face. Et si ascun le face, il rendra a celui, que per cel encheson serra attache, son damage au double, et serra en le grieve mercy le roy.

OF great men and their bailiffs, and other (the king's officers only excepted unto whom especial authority is given) which at the complaint of some, or by their own authority, attach other passing through their jurisdiction with their goods, compelling them to answer afore them upon contracts, covenants, and trespasses, done out of their power and their jurisdiction, where indeed they hold nothing of them, nor within the franchise, where their power is, in prejudice of the king and his crown, and to the damage of the people; it is provided, that none from henceforth so do; and if any do, he shall pay to him, that by this occasion shall be attached his damages double, and shall be grievously amerced to the king.

(Lutw. 1026. F. N. B. 45, f.)

The mischief before this statute was, that great men and others that had particular jurisdiction and power to hold plea of contracts, covenants, and trespasses made or done within a certaine precinct, as within a manour, citie, or borough, would attache others by their goods to answer in their courts of contracts, covenants, and trespasses made or done out of their power or franchise, pretending the same to be transitorie, and suppose the same to be done within their power and franchise, which was to the prejudice of the king and his crown in losing his fines in actions of debts and trespasses *vi et armis*, and amerciaments, and other profits upon a false supposall, not like to the generall jurisdiction, and power of the kings justices of the court of common pleas, through the whole realme; for wheresoever the contract, covenant, trespass, &c. were made, the matter being transitory, the plaintife may alledge it in what countie he will, and the king can lose nothing; and so it is in the kings bench and exchequer against privileged persons in those generall courts: and the statute saith further, and to the damage of the party being attached and sued, as he is passing and travailling within that particular precinct, upon a false supposall, where in truth he ought not. For this mischief this act provideth remedy, as by the same shall appeare.

Mag. Chart. c. 28.

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Regist. fol. 98.
Flet. l. 2. c. 42.
Cap. Itineris.

(1) *De leur bailifes.*] Here bailifes are taken for the judges of the court, as manifestly appeareth hereby.

(2) *Et des auters.*] That is, others that have particular jurisdictions and powers, as manifestly appeareth by the exception hereafter.

(3) *Forfrise les ministres le roy, as queux especiall autoritie est done a ceo faire.*] Here is to be observed,

1. That all these words belong to the exception, as by the Register appeareth.

2. That *ministri regis* are intended here the kings justices in his generall courts of justice, and so taken in this kings time, as it hath been touched before.

(4) *Des contrats, covenants, et trespas faits hors de leur poier et leur jurisdiction.*] That is, out of the precinct of the manour, or such like particular jurisdiction, &c. where by prescription or grant they have power and jurisdiction to hold plea of contracts, covenants, and debts made or done within the manour, or such other particular jurisdiction.

(5) *La ou ils ne teignent riens de eux.*] This act beginneth, *Des hauts homes*: and Bracton saith, *Sunt qui barones, et alii libertatem habentes, scilicet, soc et sac, &c. et isti possunt indicare, &c.* for *soc* is a power or jurisdiction to have a free court, to hold plea of contracts, covenants, and trespasses of his men and tenants; therefore materially were these words added; that if a great man or others having *soc*, should hold plea by force of that liberty of any that is not his tenant, it is *coram non iudice*, and punishable within this statute. It is diversly written, *viz. soc, soca, sock, soeke, soke, sockne*, and *seknes*, and it is derived from the old Saxon word *soken, sochen*, or *suchen*, *i. to enquire or find out*, that is, to enquire and find out the truth of the matter in plea before him, and to determine it accordingly, which is as much to say, as *ad inquirend', audiend', et terminand'*.

Bract. l. 2. f. 14.
Lib. 2. fol. 56.
Lib. 3. fo. 228.
Li. 5. fo. 328. b.

Mirr. c. 1. § 3.
Int' leges S. Ed.
fp. 23. & 132.

Flet. li. 1. c. 42.

And Fleta therewith agreeth, and saith, *Soke significat libertatem curie*

curiæ tenentium, quam sokam appellamus: and curia implyeth ad audiendum et terminandum.

The Mirrour saith, that *En temps le roy Alfred, perdront les suters de Doncaster leur jurisdiction ouster l'auter paine, pur ceo que ils tiendront plea defendu per les usages del realme aux judges ordinaries suters a tener*, which I rather vouch together with the derivation of the word *soc*, for the great antiquity of the law in this point.

Mirr. c. 5. § 1.

(6) *Ne deins la franchise.*] That is, nor within any such like particular power or jurisdiction, either by the graunt of the king, or prescription.

For the reliefe of the subject upon this statute, two originall writs are framed: the one in nature of a prohibition before the suit begun, commanding that the party shall not be arrested contrary to the forme of this statute.

Regist. 98.

The other, after the suit begun, the party to recover the penalty of this act, *viz.* double damages, and a command to deliver the goods attached or distrained; both which writs appeare in the Register: but the party may waive the benefit of this statute, and therefore if he plead to the action any barre, &c. he hath concluded himselfe, and shall not have any action upon this statute, therefore he must plead the speciall matter, and by that meanes take benefit of this act.

Fleta rendreth this act in this manner: *De magnatibus et eorum lalivis et aliis (exceptis ministris regis, quibus ad hoc auctoritas data est) qui ad querimoniam aliquorum, vel auctoritate propria attachiant alios per bona sua, qui per eandem potestatem et jurisdictionem veniunt ad respondendum coram eis de contractibus, conventionibus, et transgression' extra eorum potestatem et jurisdictionem, ubi nihil tenent de eis, nec sunt de libertate eorum aut jurisdictione: statutum est, quod si quis de hujusmodi convictus fuer, reddat querenti damna in duplo, ac etiam graviter amercietur.*

Fleta, li. 2. c. 42.

18 E. 2. tit.
Testament. f. 6.

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And it is to be observed that at the making of this statute, if a man had brought an action of debt, account, detinue, or covenant upon any contract by originall writ in the county of Norff. he might have declared of the contract in Suff. or any other county then where the originall was brought; for the rule was, that *debitum et contractus, &c. sunt nullius loci*, and every duty is a duty in every county: but in case of account this diversity is to be observed, that in account against a receiver the law was then as is afore-said, but if a man brought an action of account against one as bayly in one county, he could not charge him as bayliffe of a manor in another county, for that is locall.

6 E. 3. 10 E. 3. 7.
12 E. 3. bre. 479.
14 E. 3. bre. 274.
30 E. 3. 26. 4 H.
6. 6. 15 E. 4. 20.
21 E. 4. li. 7. f. 3.
Bulwers case.

But after this act it is provided by the statute of 6 R. 2. cap. 2. that in pleas of debt, or account, or such like, as detinue, or contract, it shall not be declared that the contract was made in any other county, then is contained in the originall writ.

6 R. 2. cap. 2.
13 R. 2. bre.
469.

But at the common law one that hath a particular jurisdiction to hold plea of debt, contract, detinue, covenant, or trespass with-in his mannor, or the like, could not hold plea of a debt, contract, account, detinue, covenant, or trespass alledged to be made out of the mannor, &c. because albeit it was transitory, yet was it (being so alledged) not within his power or jurisdiction which he had by prescription or by graunt; for all pleas holden there must be *infra jurisdictionem curiæ*.

3 H. 6. 30.

A4

- 2 R. 3. Testam 4. As if a lord hath probate of testaments made within the precinct
 11 H. 7. 12. of his mannor, he cannot prove a testament made out of the precinct
 of his mannor.
 17 E. 4. c. 2. And likewise of the court pipowders of contracts, &c. made out
 1 R. 3. c. 6. of the faire or market. *Et sic de cæteris.*
 lib. 6. fo. 20.
 Michelborns case. Dicr. 3 Mar. 132, 133. 7 E. 4. 19. 13 E. 4. 8. 7 H. 6. 18, 19. 13 H. 7. 19.

C A P. XXXVI.

PUR ceo que avant ceux heures ne fuit unques reasonable aid' a faire leigne fitz chivaler (1), ne a leigne file marier (2) mise en certein, ne quant ceo deveroit estre prise, ne quel heure, per quoy les uns leverent outragious aide (3), et plus tost que ne sembleit mestier, dont la people se sentit greve: pur-vivre est, que desormes de fee de chivaler entier solement soient dones 20. s. (4) et de 20. l. de terre tenus per socage 20. s. (5) et de pluis, pluis, et de meins, meins, selonque lasserant. Et que nul ne puisse lever tiel aide a faire son fits chivaler, tanque que son fits soit del age de xv. ans (6), ne a sa file marier tanque que el soit del age de 7. ans (7). Et de ceo serra fait mention en le brieve le roy fourm' sur ceo quant home le voile demander. Et si aveigne que le pier, quant il avera tiel aide leve de les tenants, morust avant quil eit sa file marie (8), les executors le pier soient tenus a la file (9), en tant come le pier avera rescueu pur cest aide. Et * si les biens le pier ne suffisent, son heire soit de ceo tenus a la file (10).

* [232]

FOR as much as before this time, reasonable ayde to make ones sonne knight, or marrie his daughter was never put in certain, nor how much should be taken, nor at what time, whereby some leavied unreasonable aid, and more often then seemed necessary, whereby the people were fore grieved: it is provided, that from henceforth of an whole knights fee there be taken but xx. s. And of xx. pound land holden in socage xx. s. and of more, more, and of less, less; after the rate. And that none shall levie such ayde to make his sonne knight, untill his sonne be fiteene yeares of age, nor to marrie his daughter, untill she be of the age of seven yeares. And of that there shall be made mention in the kings writ, formed on the same, when any will demand it. And if it happen, that the father, after hee hath levied such ayde of his tenants, die before he hath married his daughter, the executors of the father shall be bound to the daughter, for so much as the father received for the aide. And if the father's goods be not sufficient, his heir shall be charged therewith unto the daughter. (*Rastell's Translation.*)

Fleta, lib. 2. c. 40. lib. 3. cap. 14. Brit. fo. 57. & 70. Custumier de Norm. cap. 35. fol. 53, 54. (13 Rep. 27, 28, 29. 1 Roll 157. 165. Regist. 87. F. N. B. 82. B. 122. G. 25 Ed. 3. stat. 5. c. 11, Repealed by 12 Car. 2. c. 24.)

By the common law to every tenure by knights service, and socage, there were three aides of money, called in law *auxilia*, incident and implied, without speciall reservation or mention, that is to say, reliefe when the heire was of full age, aide *pur faire fits chivalier*,

lier, and aide *pur file marier*; now the first aide, *viz.* reliefe by reason of a tenure by knights service, was certain, because he was to pay it, if he were of the age of 21 years at the death of his ancestor, as hath been said before, without regard of any circumstance; and likewise the reliefe of an heire in socage being of the age of 14 at the death of his ancestor was ever certain, *viz.* to double his rent. But the aids *pur faire firs chivalier*, and *pur file marier* were incertain at the common law, for that the lords many times would pretend their eldest son, and eldest daughter to be hopefull and forward, and therefore would exact too great an aid, and before due time, whereas by the law they ought to have reasonable aids, and in reasonable time, which in a suit therefore should be determined by the justices of that court before whom the suit depended. Now the tenants found themselves grieved in three things:

1. That the said aids were outrageous and excessive, *Et excessus in re qualibet jure reprobatur communi*, so as these outrageous, and excessive aides were against law, whereof elsewhere you may reade at large.

2. The lords exacted those fines at what time they pleased before reasonable age apt for the payment of those aides.

3. That he could not avoid the same but by suit in law with his lord, wherein he found by experience those old verses true:

*Cum pare luctari dubium, cum procere stultum,
Cum puero pœna, cum muliere pudor.*

And our act saith, *Dont le people se sentist greve.*

These three mischiefs are redressed by this act, and certainty the mother of quiet and concord established therein.

But where it is said that these aids are incidents, it is to be understood that they are incidents separable, either by speciall words at the creation of the tenure, or by discharge or release by speciall words, or speciall rehearfall afterwards.

But if the lord at the creation of the tenure had reserved fealty, and 4 marks *per annum, pro omnibus servitiis, exactionibus et demandis quibuscunque*; or if the lord after the feigniori created had released to the tenant, *omnia servitia, exactiones et demanda quæcunque (except' fidelitate et reddit' iij. mercarum per annum)*, yet should the tenant pay reliefe, aid *pur faire firs chivalier*, and *file marier*, which is necessary to be knowne for the understanding of auncient deeds.

(1) *A faire leigne firs chivalier.*] Lord, grandfather, father, and two sons, the father dieth, the lord shall not have aide for his eldest grandchild, for he is not his eldest son, much lesse shall he have aide for his elder brother, or his eldest cousin and heire: but if a man hath issue two sons, and the eldest die in the fathers life without issue, he shall have aide for the second son, for he is now eldest, and the statute saith eldest son, and not first-born; yet the writ grounded upon this statute is *ad primogenitum filium suum maritandum*, but he is *primogenitus* then living. But if the lord had received aide for his eldest son, he shall not have aid again for the second, for *unicum auxilium*, one aid is onely due to one and the same lord, to make his eldest son a knight: *Non tenetur quis de uno tenemento eidem domino. plura dare auxilia ad filium suum militem faciend'.*

5 E. 3. fo. 11.
40 E. 3. 21. 47.
Mag. Char. c. 2.

Vid. Inst. sect.
127.

Lib. 11. fo. 44.
R. Godfreys
case. See before
cap.

18 E. 3. fo. 16.
40 E. 3. 22. 47.
13 R. 2.
Avowry 89.
14 H. 4. 8.
5 E. 4. 41.

Britton 57. b.
F.N.B. 82. g.
Regist. 87. in
the rehearfall of
this act it is
said, *primogenito
filio et primoge-
nitæ filia.*

Regist. ubi su-
pra.

If

Mirror, ca. 1.
§ 3.
Fleta ubi supra.
F.N.B. 82.

If the lord hath issue two sonnes, the eldest son hath issue a daughter and dieth, the lord shall not have aide to make his second son a knight, for the second son is not his heir apparent (and in this case he ought to be his heir apparent) for at this time the state of all lands was fee-simple, and the lands of the lord should descend to the daughter, and therefore the law would not have the dignity of chivalry to be apparelled with poverty, and in respect thereof the son to be knighted was to be heir apparent. And this agreeth with the letter and meaning of this act, *a faire son cigne fits chivalier*, who by common intendment is heir apparent.

If the eldest son be made a knight before the age of fifteen, the lord can have no aide, because the words be *a faire leigne fits chivalier*; and none was ever due to the lord.

If the lord hath issue bastard eigne, and mulier puisne, he shall not have aide to make the bastard a knight, for he is not in judgement of law accounted his son, but he shall have it for the mulier puisne.

Wide cap. 10.

It was holden in ancient time, that the lord could not demand aide *pur faire fits chivalier*, unless he himselfe were a knight, *ne filius antecederet patri*: but knights in ancient time grew so scarce, as esquires that were of ability to be knights, not only in this case, but in many other, supplied the place of knights; *sufficiens honor est homini, qui dignus honore est*.

Hereby it appeareth that by the policy of the law, the eldest son of a knight was not only trained up in his tender years in learning and knowledge of liberal arts to adorn the minde, but when he came to convenient yeares, did for the defence of the realme learne and exercise the deeds of armes and chivalry, that he might be able to serve his country both in time of peace, and of warre.

See 35 H. 6. 40.

(2) *Ne a leigne file marier.*] By this the policy of the law appeareth, that the eldest daughter might be timely preferred in marriage, for thereby come strength and good alliance to the family, and both these are given by law without any speciall reservation: and the observation of the ancients was, that marry the eldest daughter well, and all the rest will bee preferred the better; and to that end aide was graunted for the eldest daughter.

F.N.B. fol. 82.
c. d.

Pasch. 17 E. 1.
in Banco Rot.
38. Northampton.

(3) *Outragious aide.*] Tenant *per avails* shall be contributory to the aide for the marriage of the kings daughter. See for this word before cap. 31.

Mag. Chart. c. 2.

(4) *De fee de chivalier entier solement soient done 20. s.*] Here it is to be observed (as it hath been noted) that reliefe is the fourth part of a knights fee being then 20. l. is 5. l. and aide *pur faire fits chivalier*, or *pur file marier*, is the twentieth part of a knights fee, viz. 20. s. limited by this act.

See more hereof
in the Commen-
tary upon the
statute of 1 E. 2.
de militibus.

(5) *Et de 20. l. de terre tenus per socage.*] This summe is set downe because the value of a knights fee was then 20. l. (which then was sufficient to maintaine the dignity of knighthood) and so the statute maketh them equall in value; the king was not bound by this statute, but he might take such reliefe, and at such time as was due by the common law.

25 E. 3. c. 10.

But the statute of 25 E. 3. doth asseffe the aides at such a rate as this statute doth, and that act doth well expound this statute.

statute, that none shall pay these aides but the tenants of the land holding the same immediately in demesne without any mesne.

For mesne lords ought to pay no aide implied in these words of our act, *De fee de chivalier, et de 20. l. terre*, and if the tenant *perwaile* by knights service goeth with his lord, &c. he discharge all the mesne lords. Note these words, *De fee de chivalier*, doth exclude grand serjeanty, for he that * holdeth by that tenure shall pay no aide to the lord either to make his son a knight, or to marry his daughter; for by this act it appeareth, that none shall pay any aide but tenants by knights service, or tenant in socage, and no other tenure.

(6) *Tanque le firs soit del age de 15 ans.*] Note no man shall be compelled to take knighthood upon him untill he be 21 yeares old, and have sufficient land for maintenance of that degree, yet at the age of fifteen yeares he may begin to learn some things that belong to chivalry, but it is good for the lord to make what speed he can after that age to recover the aide either by the writ *De auxilio ad filium suum militem faciend'*, or by distress: for if the son die, the lord loseth the aide, for that by his death the finall cause ceaseth, and so likewise if the father dieth, the aide is lost, for that the duty and remedy is onely given to the father, who in respect of nature hath the wardship of his eldest son, and as a naturall father is to provide for his advancement; and so as a father by the law of nature is bound to provide a competent marriage for his daughter, which are therefore personall to the father: and so note the diversity betweene reliefe, which is absolutely due to the lord in respect of the feignory meerly, and these aides, which are not absolutely due to the lord, but for the performance of a duty of nature.

(7) *Tanque el (s. la file) soit de 7 ans.*] In auncient time gentlemen of good houses, for knitting themselves in greater bonds of amity and alliance, married their children very young, which the law doth seeme to favour, for that it giveth her dower, if she be of the age of nine yeares at the death of her husband, whereof I have knowne some to have prospered well, but more that have proved unfortunate.

(8) *Et morust avant que il avoit sa file marie.*] Here our act giveth onely remedy to the daughter, and maketh no mention of the son in that case, and yet the son shall have the same remedy against the executors, that the daughter shall have, being in *equali jure*.

Tenant for life, or tenant in dower shall not have aide *pur file marier, ou pur faire firs chivalier*, but the verie lord, to whom by possibility they might inherit, and whom the lord by nature is bound to preferre: but tenant for life, &c. shall have escuage, ward, marriage, and reliefe.

If the father receive the aide, and after the son is knighted, or the daughter married in the life of the father, neither son nor daughter shall have remedy for the aide, for the end of the law is performed. But by the whole context of this act it appeareth, that small portions preferred in marriage the daughters of good families, when vertue and good blood was more esteemed then great portions.

(9) *Les executors son pier sont tenus al file.*] Note, the father himself hath time to make his eldest son a knight after his age of 15,

Rot. Parliam.
29 E. 3. nu. 16.

6 H. 3. Avowry
242. F.N.B. 83.
k. 11 H. 4. 34.
10 H. 4. Avowry
267. 10 H. 6.
Aunc' demesne
11 Rot. Par.
9 H. 6. nu. 15.
* [234]

1 E. 2. stat. de
militibus.

Jura naturalia.
Inst. sect. 114.
Lib. 7. fo. 13 b.
Calvins case.
1 E. 3. fo. 17.
33 H. 6. 57.

F.N.B. 82. i.
ct 83. a.

Hil. 9 E. 2 fo.
62, 63. in libro
meo. Phil. Lecu-
tynes case.

3 E. 3. Debt 156.

and to marry his daughter after her age of 7 yeares at any time during his life, and therefore though the father receive the aides, yet have they no remedy against him, but to depend upon his paternal care, and their remedy is against the executors, or administrators of the father, if they be not preferred in his life time, as it appeareth by this act.

(10) *Et si les biens le pier ne fussent, son heire de ceo soit tenu a le file.*] And here it is to be observed, that if the personall estate of the lord be sufficient to pay the aide, the heire (who is to maintain the state and countenance of his father) is not to be charged therewith.

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3 E. 3. Debt 157.

In an action of debt brought by the eldest daughter against the heire for an C. s. which the father received of his tenants for reasonable aide to marry her, and that she was not married in his life time, &c. and in her declaration made no mention that the executors had no assêts, and yet the count was ruled to be good, for that is the ordinary count in an action of debt, which the statute giveth, and if the executors have assêts, the heire shall plead it in barre.

Although the statute be, that his heire shall be bound to the daughter, it is understood, that he shall be bound, if he hath assêts in fee-simple by descent from his father.

The daughter shall not recover part against the executors, and the residue against the heire, but either all against the executors, or all against the heire, as these words doe prove.

F.N.B. ubi supra.

Mirr. c. 1. § 3.

The eldest son must have his remedy onely against the executors, for he himselfe is heire.

And these aides appeare by the Mirror to be very auncient, ordained by king Alfred, and other auncient kings, for he saith, *Et que escuage, reliefe et aides, se fissent per les tenants a lour seigniours de lour heritage relievier, les heires les seigniours faire chivaliers, et de lour eignes files marier.* It is to be observed how moderate the aids be by force of this act, and therefore it is to be collected that the fees of the heralds were then (and yet ought to be) moderate also.

C A P. XXXVII.

PURVIEW est et accorde enserment, que si home soit attainct de disseisin fait en temps le roy que ore est (1), ouesque robbery (2), de ascun maner de chattel, ou de moveable (3), et soit trove vers luy per recognisance de assise de novel disseisin, le judgement soit tiel, que le plaintiff recouvrera sa seisin et les damages, auxibien de chattel et de moveable avantdits, come de soile. Et le disseisor soit rente (4), le quel que il soit present ou non, issint que [sil soit present] primes soit agard a la prison.

IT is provided also and agreed, that if any man be attainct of disseisin done in the time of the king that now is, with robbery of any manner of goods or moveables, and be found against him by recognisance of assise of novel disseisin, the judgement shall be such; that the plaintiff shall recover his seisin and his damages, as well of the goods and moveables aforesaid, as for the freehold, and the disseisor shall make fine, which, whether he be present or not so it be presented) shall first

prison. Et per mesme le maner soit fait de disseisin fait a force et armes, tout ne face home robbery (5).

first be awarded to prison. And in like manner it shall be done of disseisin with force and arms, although there be no robbery.

See Marl. ca. 14. verb. Attinct. the first part of the Inst. sect. 514. Verb. en Attaint. (Fitz. Damages, 10. 14 H. 7. 15.)

This statute is made in affirmance of the common law, as appeareth by originall writs of assise, wherein the words be, *Facias tene-ment' illud reseisiri de catallis quæ in ipso capta fuerunt, et ipsum tene-mentum cum catallis esse in pace usque ad primam assisam*; which writ was at the common law before this statute, as it appeareth by Glanvill, and by Bracton who wrote before this act.

Glanv. l. 3. ca. 33, 34, &c.
Bract. l. 4. f. 179.

And the judges of the assise ought to enquire of the same, for if goods be taken away by the disseisor, it is a disseisin with force, and therefore *ex officio*, the judges ought to enquire thereof. 11 H. 4. 16, 17.

11 H. 4. 16, 17.

(1) *En temps le roy que ore est.*] Yet this act being in affirmance of the common law doth extend to all times after, which the judges in 4 E. 2. not observing, nor remembring the words of the writ of assise denied to enquire of the taking away of the goods.

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4 E. 2. damage 10.

(2) *Ovesque robbery.*] Here [robbery] is taken in a large sense, for a wrongfull taking away of goods, as a wrong doer and trespasser.

(3) *De ascun manner de chattel, ou de moveable, &c.*] If a man be disseised, and hath goods, which he hath thereupon as executor or administrator, taken away, these are not accounted his goods within this statute, because he hath them, in *auter droit*, to the use of the dead,

8 E. 3. 3. 54.

A man seised of land in the right of his wife, or joyntly with his wife, and is disseised, and his goods taken away; in an assise brought by the husband and wife, he and his wife shall recover seisin of the land, and he alone upon that originall brought by him and his wife shall have damages, which is worthy of observation.

11 H. 4. 16.
7 H. 6. 30 b.

And so it is, if two joynt-tenants be disseised, and the goods of one of them taken away, both shall recover the land, and the one damages for his goods: these be the only cases that I remember in the law, where one demandant or plaintiff without any summons or severance shall have judgement alone in one originall; for regularly the judgement ought to be given according to the originall writ: as if the husband and wife bring an action of battery for the beating of himselfe and his wife, the writ shall abate, because the wife cannot joyne for the battery of her husband, and the husband cannot have judgement alone, because his wife is joyned with him in the originall; *et sic de similibus*.

12 E. 4. 6.

But the assise is a speciall case, for the plaintife making his plaint to be disseised of his free hold in such a towne with the appurtenances generally, yet shall he recover his goods, if the disseisin be found with robbery of his goods, as the statute speaketh, and the goods are contained in the originall, and not in the plaint; and the assise of *novel disseisin* was *festinum remedium*, and much favoured in law for the reliefe of the disseisee, both for the regaining of his possession

possession

Coram Reg.
Tr. 4 H. 4.
Rot. 24. Suff.

feſſion of the land, and of his ſtock of cattle, and goods thereupon : therefore where our act ſaith, that the plaintife ſhall recover his ſeiſin, and his damages, as well for the goods and moveables aforeſaid, as for the freehold, it is ſo to be underſtood *reddendo ſingula ſingulis*, according to that which hath been ſaid. William Burchefter, and Margaret his wife were diſſeiſed of the land which he held in the right of his wife, and diſpoſſeſſed of his goods; in an aſſiſe brought by the huſband and wife, judgement was given for them both, *Damna pro diſſeiſina C. l. pro bonis C. marc'* : in a writ of error the judgement was reverſed for the C. marks, becauſe the wife had nothing in them.

(4) *Et le diſſeiſor ſoit rente.*] And the diſſeiſor ſhall be fined, which is alſo in aſſurance of the common law, for a diſſeiſin with taking away of goods is a diſſeiſin with force, and therefore finable.

(5) *Et per meſme le maner ſoit fait de diſſeiſin fait a force et armes, tout ne face home robbery.*] Note the writ of aſſiſe mentioneth not a diſſeiſin *vi et armis*, but the words thereof be *Injuſte et ſine judicio diſſeiſiuit*, and therefore if the jurors finde a diſſeiſin, and no force, the judgement ſhall be *ideo in miſericordia*, and not *quod capiatur*, but as it hath been ſaid, the court *ex officio* ought to enquire of the force; but if they doe not, it is not error, as it hath been adjudged.

M. 25 & 26 El.
Co. Reg. in bre.
de Error. int'
Bartlet &
Baxter in Aſſ.
de freſh force in
Ipſewich.

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CAP. XXXVIII.

PUR ceo que aſcuns gentes de la terre doutent meins faux ſerement faire, que faire ne doiſſent, per que mults des gentſon diſherites, et perdent leur droit : purview eſt, que le roy, de ſon office, deſormes donera attaints ſur les enqueſts en plea de terre, ou de franktenement, ou de choſe que touche franktenement, quant il ſemblera que beſoigne ſoit (1).

FORASMUCH as certain people of this realn doubt very little to inake a falſe oath (which they ought not to do) whereby much people are diſherited, and loſe their right; it is provided, that the king, of his office, ſhall from henceforth grant attaints upon enqueſts in plea of land, or of freehold, or of any thing touching freehold, when it ſhall ſeem to him neceſſary.

(44 Ed. 3. 2. Regiſt. 122. Raſt. 84. 1 Ed. 3. ſtat. 1. c. 6. 5 Ed. 3. c. 6. & 7. 28 Ed. 3. c. 8. 34 Ed. 3. c. 7.)

Pafeh. 32 E. 3. fo. 65. in libro meo. H. 3. graunted to the Burgeſſe of S. Albans, that none of them ſhould be impleaded of no freehold in attainr, &c.
& *allocatur*.

The miſchief before this ſtatute (which was the firſt concerning attaints) was, that albeit (as the common opinion is) an attainr did lie upon a falſe verdict given in a plea of land, yet the king many times would not graunt it without ſuit made to him, which turned the party grieved, not onely to great delay, but to extreame trouble, attendance, and charges. And the reaſon that made the difference between the plea reall, and the plea perſonall, was, that in the plea perſonall the party grieved had no other remedy, but the attainr; but in the plea reall he had other remedy in an action of higher nature, and for that cauſe was not granted without difficulty.

And

And some judges held, that in a plea reall an attaint did not lie, and therefore this act provideth that the king shall grant it * *ex officio*, that is, *ex merito justitiæ*. And this act is holden to be in affirmance of the common law, whereof you shall reade at large, Marlebr. cap. 14. And this is the common opinion agreeable with our old bookes, as there you may reade.

That perjury in jurors was punished before this act hath been sufficiently proved already: now the preamble of this act giveth just occasion to examine whether perjury also in witnesses were punishable by the auncient lawes of England; *De pejerantibus præterea statutum est, ut si quis iururandum violarit, falsumve dixerit testimonium, fides ei in posterum non habetur, verum is in ordinalium ad-judicator.*

Si quis falsum jurasse convictus fuerit, ei postea non modo non creditor, verumetiam sacra ei etiam prohibetur sepultura.

Si quis sacra tenens pejerasse convictus fuerit, ei manus præciditor, &c.

Vide inter leges W. Conq. fol. 125. b.

And the Mirror saith, *Que solonque les auncient priuiledges, et usages ascuns se sont per perde del ponce, come est de faux notaries, et de ciffers de burfes de meyns q. xii. d. et puis que vi. d. que le roy R. 1. se chaungea a la partie de oriel, ascuns per couper des langues, come seloit esfre de faux testimoines.*

And in the same chapter treateth further of this matter, saying, *Perjury est graund peche, &c.* whereof you may reade there more at large. Britton saith that it was punishable, and to be enquired of *De ceux queux se voilent perjurer pur loier.*

Fleta describeth perjury thus, *Perjurium est mendacium cum juramento firmatum*; and further saith, *Et tribus modis committitur; primo, cum quis scit, vel putat aliquid falsum esse falsum, et jurat esse verum; secundo, cum quis fallitur, et credit verum esse quod est falsum, et temere et indifereite jurat; tertio, si quis credit falsum esse verum, et jurat quod verum est.*

Where you may reade further of this matter. And of some it is called, *crimen læse conscientie*.

Thomas Vigras and two others were found guilty, &c. of perjury.

18 E. 3. 53. Once forsworne, and ever forlorne.

7 H. 6. 25. Perjury punished.

Vide the statutes of 3 H. 7. cap. 1. 11 H. 7. cap. 25. 32 H. 8. cap. 9. 5 Eliz.

Upon all that which hath been said touching this point, you may observe how milde the late laws have been in punishing of perjury in respect of the auncient, wherein I have been the longer, for that some have given out, that perjury was not punished by the auncient laws of England, wherein there should have been a great defect, and an encouragement to ill disposed men, if jurors should by the common law have been punished for perjury, and witnesses, which are great motives to them of giving their verdict, should be perjured, and not be punished.

(1) *Quant il semble que besoigne soit.*] See 5 E. 1. which was within two yeares after this act, an attaint was brought upon a false verdict given in assise before justices in eyre before the making of this statute: and the record saith, *Quod non est intentio domini regis, nec extitit tempore confessionis statuti prædicti, quod breue de attinctu transiret super hujusmodi inquisitionibus ante statutum captis, prout*

II. INST.

T

Johannes

* De son office.

Marlebr. ca. 14.

Int' leges Edw. Regis, 48. 3.

Inter leges Ethelritani, 67. 25.

Inter leges Canuti 113. 34.

Mirror, c. 4. de paines. 10 H. 3. Coron. 434.

Britton, fo. 38. Fleta, l. 5. c. 21. & li. 2. cap. 1. Braet. l. 4. f. 289.

Braet. fo. 292.

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Hil. 8 E. 1. in Comuni Banc. Rot. 38. Essix. John of Huntingfields case.

Mich. 5 E. 1. in Banco Rot. 63. Midd.

Johannes de Lowet recordatur, imò post statutum concessum consideratum est quod querens nihil capiat per breve, &c. And this was the law taken then by colour of these words; but others hold, that these words are not to be so taken for the reason aforesaid, for that the party grieved in this plea reall had remedy in an action of higher nature: but later statutes quoted before in the margent have cleared this point.

C A P. XXXIX.

ET pur ceo que le temps est mult passé puis que les briefes desouth nosmes fuerent auterfois limittes: purview est, que ce count countant de descent en brieft de droit, nul ne soit ci ose de counter de la seisin son anc' de plus longe seisin que de temps le roy R. (1) uncle le roy Henry, pier le roy que ore est. Et que le brieft de novel disseisin, et de purparty, que est appelle nuper obiit, eyent le terme puis le primer passage le roy Henry, pier le roy, que ore est en Gascoigne (2), mes nemy avant. Et les briefes de mortdanc', de cosinage, de ayle, de entre, et brieft de neisfrie, eiant le terme del coronement mesme le roy Henry (3), et nemy avant. Mes que tous les briefes ore a per mesme purchases, ou a purchaser, entour cy et [la seisi] S. John en un an, soient pledes de temps que avant solent estre pledes.

AND forasmuch as it is long time passed since the writs undernamed were limited; it is provided, that in conveighing a descent in a writ of, right, none shall presume to declare of the seisin of his ancestor further, or beyond the time of king Richard uncle to king Henry, father to the king that now is; and that a writ of novel disseisin, of partition, which is called nuper obiit, have their limitation since the first voyage of king Henry, father to the king that now is, into Gascoine. And that writs of mortdancesthor, of cosinage, of aiel, of entry, and of nativis, have their limitation from the coronation of the same king Henry, and not before. Nevertheless all writs purchased now by themselves, or to be purchased between this and the feast of St. John, for one year compleat, shall be pleaded from as long time, as heretofore they have been used to be pleaded.

(1 Inst. 114, 115. 20 H. 3. c. 8. 32 H. 8. c. 2. 21 Jac. 1. c. 16.)

1. Inst. sect. 170.

(1) *De temps le roy R.*] That is by construction from the first day of the reign of king Richard the first, and so hath it been resolved in parliament.

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34 H. 6. 36.

Inst. ubi supra.

This act doth limit within what time the seisin shall be in a writ of right, and by construction the time of prescription is taken for this time.

(2) *Puis le premier passage le roy Henry, &c. in Gascoine.*] That was in anno 5 H. 3.

(3) *Del coronement mesme le roy Henry.*] H. 3. was crowned 28 Octobris, anno Dom. 1217. et regni sui primo; but others say he was crowned 16 Junii, anno regni sui primo.

This king was crowned again in anno 5. of his reign, but this act intendeth his first coronation.

Vet Mag.
Chart. 14.

These

These limitations are altered by the statute of 32 H. 8. as you may read before in the exposition upon the statute of Merton, cap. 8. See the first part of the Institutes, sect. 170.

CAP. XL.

PUR ceo que mults des gents sont delayes de leur droit, per fausement vouchier a garranty: purview est que en briefes de poss (1), tout adeprimes come en briefe de mortdaunc', cosinage; del ayle, nuper obiit, de intrusion, et auters briefes semblables; per les queux terres ou tencments sont demànds (2); queux devoient discender (3), reverter (4), remainder (5), ou eschier (6), per mortdanc', ou dauter, que si le tenant vouchie a garrant', et le demandant luy counterpled', et voile averrer per assise, ou per pays, ou en auter maner, sicome le court le roy agarde, que le tenant (9) ou son aunc' (8) que heire ilest, fuitle premier que entra (10) apres la mort celuy de que seisin il demand, soit le averrement del de demandant rescève (7), si le tenant le voile attendre, et si non, soit bote ouster le auter respons (11) sil neit son garrantor en present, que luy voile garranter de son gree (12), et maintenant enter en respons, salve al demandant ses exceptions enconter luy, sil voile vouchier ouster, come il avoit avant, enconter le primer tenant. De recherche en tous maners des briefes dentre, queux sont mention des degrees: purview [est] que nul desormes vouchie (13) hors de la line (14). Et en auters briefes dentrie; ou nul mention est fait de degrees (15), les queux briefes ne sont sustenus, forsque la ou les avantdits briefes de degrees ne poient giser ne lieu tener. Et en briefe de droit (16) purview est; que si le tenant vouchie a garranty, et le demandant le voile counterpleder, et soit prist * de averrer per pays, que celuy que est vouchie (17) a garranty, [ne nul] de ses ancesters (18) ne unques avoient seisin de la terre, ou

* [240] del

FORASMUCH as many people are delayed of their right by false vouching to warranty; it is provided, that in writs of possession; first in writ of mortdauncester, of cosinage, of aiel, nuper obiit, of intrusion, and other like writs, whereby lands or tenements are demanded, which ought to descend, revert, remain, or escheat by the death of any ancestor, or otherwise, if the tenant vouch to warranty, and the demandant counterpleadeth him, and will aver by assise, or by the country, or otherwise, as the court will award, that the tenant, or his ancestor (whose heir he is) was the first that entered after the death of him, of whose seisin he demandeth; the averment of the demandant shall be received, if the tenant will abide thereupon; and if not, he shall be further compelled to another answer, if he have not his warrantor present, that will warrant him freely, and incontinent enter into the warranty; saving unto the demandant his exceptions against him, if he will vouch further, as he had before against the first tenant. From henceforth in all manner of writs of entry, which make mention of degrees, none shall vouch out of the line: or in other writs of entry, where no mention is made of degrees, which writ shall not be maintained, but in cases where the other writs of degrees cannot lie, nor hold place: and in a writ of right it is provided, that if the tenant vouch to warranty, and the demandant will counter-plead him, and be ready to aver by the country, that he that is vouched to warranty, nor his ancestors, had never seisin of the land

T 2

land

del tenement (19) demande (20), ne fee, ne service per la maine le tenant, ou [ascun] de ses auncesters (21), puis le temps celuy de que seisin le demandant counte (22) jefques al temps que le brieve fuit purchase et plee move (23), per que il poit le tenant ou ses auncesters aver s'offe: adonques soit l'averement del demandant receivre, si le tenant le voil' attendre, et si non, soit le tenant bote ouster a auter respous (24), sil nait son garrantor en present, que luy voile garranter de son gree, et maintenant enter en respous, salve al demandant ses exceptions enconter luy, sicome il avoit avant enconter le primer tenant. Et lavantdit exception eit lieu en brieve de mortdauncestre, et en les auters briefes devant noines, auxibien come briefes queux touchent droit (25). Et si le tenant per cas eit charter de garranty de auter home de ceo chose que soit obligé en nul des avantdits cases (26) a le garranty de son eigne degree, salve luy soit son recoverer per brieve de garranty de charter de le chauncellor le roy, quant il le vendra purchaser, mes que le plee ne soit pur ceo delay.

land or tenement demanded, nor fee or service by the hands of his tenant, or his ancestors, since the time of him, on whose seisin the demandant declar-eth, until the time that the writ was purchased, and the plea moved, whereby he might have infeoffed the tenant, or his ancestors, then let the averment of the demandant be received, if the tenant will abide thereupon; if not, the tenant shall be further compelled unto another answer, if he be not present that will warrant him freely, and incontinent enter in answer, saving unto the demandant his exceptions against him, as he had afore against the first tenant. And the said exception shall have place in a writ of mortdaunce-
 tor, and in the other writs before named, as well as in writs that concern right. And if percase the tenant have a deed, that compriseth warranty of another man, which is bound in none of these cases before mentioned to the warranty of an elder degree; his recovery, by a writ of warranty of charters out of the king's chancery, shall be saved to him at what time soever he will purchase it; howbeit the plea shall not be delayed therefore.

(Bro. Parl. 34. Fitz. Counterplea de Voucher, 73. 81, 82, 83. 89. 96. 98. 100. Fitz. Counterplea, &c. 3, 4, 5, 7, 8, 9, 10. 17; 18. 20. 23, 24. 27. 29, 30. 40, 41, 42. 44. 48, 49. 58, 59. 60. 63. 67. 85. 88. 94. 114. 126. Fitz. Execut. 122. Fitz. Car. de Charters, 3, 4, 5. 7, 8, 9, 10, 11, 12, 13. 19, 20, 21, 22. 26. 28, 29, 30, 31. 20 Ed. 1. stat. 1. De Vouchers.)

13 F. 1. counter-
 plea de voucher.
 113. 16 E. 2.
 ibid. 110.
 8 E. 3. 61.

The mischief before this statute was, that every tenant in a reall action was permitted to vouch any of the people, though he or any of his ancestors had never any thing in the land whereof he might enfeoff the tenant or any of his ancestors; and againe that vouchée might vouch another in like manner, and upon every summons *ad warrantizandum*, there must be nine retourners, &c. so as the delay was in manner infinite, and all upon false vouchers; which matter being shewed in this parliament, *Fuit advise al roy que cest ley fuit malveis*, for it is a maxime in law, that *Lex dilationes semper exhorret*; whereupon this act of parliament for remedy was made.

22 H. 6. 40. per
 Markham.
 Instit. sect. 143.
 Glanv. l. 13. c.
 9, 10. & alibi
 repe.
 Bract. l. 5. f. 380.
 Britton, c. 75.

[Vouchée a garranty.] For this word [vouchée] see Lit. Vide Glanv. of this matter.
 Vide Bracton, a whole tractate of vouching to warranty.
 Vide Britton, a chapter of the same.

Fleta

Fleta saith, *Sunt autem nonnulli lites protrahere nitentes, minores falso vocant ad warrant, et de quibus provisum est* (summing up the principall part of this statute in few words) *quod si petens replicando offerat verificare quod vocatus nec aliquis antecessorum vocati nunquam seisinam habuit de re petita, secundum nec servitium per manus tenentis vel alicujus antecessoris ejus a tempore ejus ex cuius seisina petit usque ad tempus impetrationis brevis et placiti moti, per quod potuit verificare tenentem vel ejus antecessores inde seofatos fuisse, admittatur verificatio illa si tenens voluit hoc expectare, alioquin ulterius respondere compellatur, salvo petenti talibus replicationibus, quales versus principalem tenentem obtineret: et si tenens chartam habuerit alicujus extraneæ personæ qui se ad warrantiam obligaverit, vel per antecessorem obligatus fuerit qui gratis warrantizare voluerit, tunc competit tenenti remedium per breve de warrantia chartæ, sed propterea non capiat placitum jam motum dilationem.* Fleta, lib.

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In ancient time it seemed strange when the originall præcipe was brought against the tenant of the land, that the court upon that original should hold plea between the tenant and the vouchee, but it is more strange to make a question of that, which hath received an ancient, continuall, and constant allowance, and the vouchee commeth in *in loco tenentis*, and in judgement of law is a tenant to the demandant, and our act doth allow of true vouchers, but provideth against false vouchers, as our act speaketh, for delay onely.

Mirror.

8 E. 3. 61.

(1) *En briefes de possession.*] So called, because either the auncellor, of whose seisin he demands, was in possession the day he died, or the demandant himselfe was in possession, as *mortdaunc*, *cofinage*, *aiel*, *nuper obiit*, *intrusion* and other like writs, as *besaile*, &c.

8 E. 3. 57. b.
32 E. 3. Count.
de voucher 82.
21 E. 3. 11.
46 E. 3. 2.

The diversity between the actions *auncestrel droituel*, and the actions *auncestrel possessorie*, you shall reade at large in my reports in Markals case, and is necessary to be observed for the understanding of this act, which maketh the same distinction of actions.

Li. 6. fo. 34, 35,
&c.
Markals case.

(2) *Per les queux terres ou tenements sont demaundes.*] In a writ of right of ward of body and land, the defendant vouches, and the plaintife counterpleads the voucher by this first branch of this act, that the defendant was the first that abated after the death of his tenant, and the same continued till the voucher, and adjudged a good counterplea; for albeit it is named a writ of right, and so in letter is out of this branch, yet is it in nature of a writ of possession, and the words are *per mort dauncester ou dauter*, and though no lands or tenements be demanded, which regularly is intended of an estate of freehold, yet this case being within the same mischief is taken within the remedy.

8 E. 3. 57. 61.
21 E. 3. 11.
22 E. 3. 6.
25 E. 3. 39.
32 E. 3. Count.
de vow. 13.

In dower the tenant vouch T. cosine & heire; A. the demandant said that her husband died seised, and the vouchee was the first that abated; and a good counterplea within these words, *autres briefes sembles*, but that plea is not in case of the heire.

2 E. 3. 31.
22 E. 3. 3.
32 E. 3. 75. a.
in libro meo.

(3) *Discender.*] A *formedon* in the descender is out of this branch, for it is a writ of right in his nature, and not a writ of possession, and he demandeth not the land of the seisin of his auncellor, as the statute speaketh, but of the gift.

4 E. 3. 56.
39 E. 3. 36. b.

T 3

(4) *Rever-*

32 E. 3. infra †.

4 E. 3. Count
de voucher.

† See 32 E. 3.
fol. 74, 75. in
libro meo. Lo-
pinion del Court
al contrary.

vide 32 E. 3. tit.
countplea de
voucher. 82.

4 E. 3. 33.
32 E. 3. count-de
vow. 82.

3 E. 3. vowch.
199. 26 H. 6.
tit. count. de
voucher 5.
21 H. 6. 50.

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The first coun-
terplea given by
this act.

46 E. 3. 2.
4 E. 3. Count
de Voucher 96.

40 Aff. 22.

Hil. 9. E. 2. fo.
63. in lib. meo.
en Cofinage.

(4) *Reverter.*] A *formedon* in the reverter is not within this branch, for that it is a writ of right in his nature.

(5) *Remainder.*] A *formedon* in the remainder is not within this branch, for it is no writ of possession, but a writ of right in his nature, and the demandant doth not demand the land of the seisin of his auncester, as the statute speaketh, but by the remainder.

(6) *Eschier.*] This is in the English translation turned to escheate, which ought not to be, but *eschier* signifieth to fall, and a writ of escheat is not within this branch, for that it soundeth in the right, and reverter, remainder, or *eschier* is to be intended after the death of his auncester, or tenant for life, tenant in dower, or by the curtesie.

An assise of *novel disseisin*, and in assise of *darrein presentment* are within this branch, if the tenant vowch any named in the writ, and the demandant may counterplead the voucher, as well when the tenant is present in court, as when he is absent.

(7) *Que le tenant ou son auncester que heire il est fuit le premier que entra apres la mort celui de que seisin il demaund, soit laverment del demandant rescieve.*] A. dieth seised in fee, B. abateth, and maketh a lease for life, and graunteth the reversion to C. in fee, and dieth, C. graunteth the reversion to D. the heire of B. tenant for life is impleaded in a writ of cosinage, and makes default after default, D. is received and vowcheth to warranty C. the demandant counterplead the voucher, for that B. was the first that abated after the death of his auncester, of whose seisin he makes his demand; and two objections were made, that this counterplea was not within this statute. 1. That D. claimed the reversion by purchase, and so B. was not his auncestor within this statute, for he claimed not the land as heire. 2. That this statute speaketh of the tenant, which must be understood of the tenant for life, who is the tenant to the *præcipe* in deed, and not of the tenant by receipt, who is tenant in law: as to the first it was answered and resolved, that in as much as the abatement is confessed, albeit that divers states be made, yet for that D. is heire to the abator, and B. his auncester within the letter of the statute, and *injuria per circuitum non tollitur*, and so within the meaning. But if the state of the abator had been avoided by a title paramount, and the heire of the abator had been enfeoffed, there the heire had not claimed under the abatement, and therefore although he were within the letter of this act, yet had he been out of the meaning.

(8) *Auncestre.*] And where it is said here auncester, predecessor is taken by equity; for acts of parliament made for suppression of falsehood practised for delay, as these false vouchers be, shall have a benigne interpretation.

(9) *Tenant.*] To the second, albeit tenant by receipt be but tenant in law, yet is he in lieu of the tenant, and so within this branch, for otherwise the abator may make a lease for life, and by his default after default be received, and so by covin between them make this branch of none effect, which should be against reason, *et in fraudem legis*; and tenant in law by warranty is within this act, albeit he be not present in court.

(10) *Prmier que entra.*] A. and B. doe abate to the use of B. the whole state is in B. if B. infeoffe A. this coadjutor is within this act, and yet he gained no freehold, but this statute saith, *Le primer que*

que enter, and though he entred not at the first folie, yet is he within this statute.

But if the abator maketh a feoffment in fee, and taketh back an estate to him and a stranger, and they both be impleaded in a writ of *aiel*, and vouch their feoffor for the benefit of the stranger (who is out of the statute) the vouchor cannot be counterpleaded within this branch.

But if the stranger release to the abator, and he be impleaded, and vouch, this vouchor may be counterpleaded by force of this branch.

(11) *Et si non, soit bote ouster al auter respons.*] So as this clause giveth no benefit to the tenant unless he giveth over his vouchor, and then he shall be received to answer, but if he stand to his vouchor, and demurre in law upon the counterplea, and it be adjourned to another terme, it is peremptory to the tenant in respect of the delay, in such sort, as if issue had been taken, and a triall had: By these words [*Soit bote a auter respons*] he may as well vouch as plead in chiefe. Note the words be, *Soit bote a auter respons, et ne dit en chiefe*, so as any answer sufficeth, and therefore the vouchor may plead outlawy in the plaintife in an action of debt, after the last continuance.

But if the counterplea be adjudged for the demandant in the same term, he may plead in bar, but he cannot vouch.

A demurrer in law upon a voucher adjourned to another term is peremptory; for the demurrer is in lieu of an answer, otherwise in case of counterplea the same term, as hath been said.

(12) *Sil neit son garantor en present, que luy voille garrant' de son gree, &c.*] In a writ of right of ward, the defendant vouch, and for that the vouchor was present in court, and entred into warranty, the plaintife could not counterplead.

(13) *Des receise in tous maners des briefes des entries queux font mention des degres: purveu est que nul disformes vouchera hors del lien.*] A disseisor makes a lease for life, the remainder in fee, the disseisee brings a writ of entry *sur disseisin* in the *per* against the lessee, who makes default after default; he in the remainder is received, he shall vouch out of the line, because he is not within the degrees mentioned in the writ.

And there is no such mischief in this case, as should follow, if the law were so taken in the first branch, as before it appeareth.

But of the vouchor, in case of the *per et cui*, Fleta saith, *Fiat vocatio de persona in personam, et de warranto in warrantum de personis in brevi nominatis usque ad ipsum disseisitorum*; and the reason may be, because it appeareth that the vouchor is within the degrees mentioned in the writ: and the words of the statute are generall, *Nul vouchera hors de lien*; in which words, the vouchor is included. Lastly, it had been to little purpose, to restrain the tenant in the *per*, and to let the vouchor in the *cui* at large; so as this branch hath (as you see) his special reason.

If a writ of entry in the *per* be brought against the husband and wife, and upon the default of the husband the wife is received, she shall not vouch out of the line, because she is party to the writ.

So it is, if a writ of entry in the *per* be brought against the tenant

45 E. 3. 16.
8 H. 7. 5.

40 E. 3.
14. Br. tit. Coun.
de vouch 5.
21 E. 4. 54.

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22 H. 6. 40.
11 H. 4. 22.
42 E. 3. 16.
10 H. 7. 22.

Hil. 9 E. 2. fol.
63. in lib. m. o
en Cofinage.
Temps. E. 1.
Count. de
Vouch. 116.
See the statute
de Vocat. ad
Warr. 20 E. 1.
The second
counterplea
given by this act.
16 H. 7. 5.
9 E. 3. 16. simile.

Fleta, li. 5. c. 37.

for life, and he pray in ayd of him in the reversion, and he joyn in ayd, he must joyn in plea with the tenant, and therefore shall not vouch out of the degrees.

(14) *Hors del lien.*] Lien is properly the binding of the vouchee by force of the warranty; for the vouchee saith, *Que aves a vous a lier a garranty*; and then the tenant sheweth the *lien*, that is, the deed or fine, &c. that bindeth him to warranty: here it is taken for the degrees; of which you have heard before, in the exposition of the last chapter of Marlebridge.

In a writ of entry in the *per* and *cui* against B. of the feoffment of A. A. dyeth, B. shall vouch the heir of A. for the heir is within the intention and meaning of this law, lest he should lose his warranty (so much favoured in law) by the act of God, *viz.* the death of A.

(15) *Et in autres briefes dentre ou nul mention est fait de degrees.*] That is, writs of entry in the *post*; whereof, and of this whole clause, somewhat hath been spoken in exposition of the said statute of Marlebridge.

(16) *Et in briefe de droit.*] This is not onely understood of a writ of right right, but of all writs of right in his nature, or which touch the right, as this law hereafter speaketh, as the writ of escheat, writs of formdon in reverter, remainder, discenter, &c.

(17) *Que celui que est vouché.*] If the tenant vouch A. as assignee to B. the demandant may counterplead the seisin of B. within the meaning of this branch, for that overthrows the voucher, which is the end of this law.

^a If an infant be vouched as heir to A. it is not sufficient to counterplead the seisin of A. the ancestor, for that the infant cannot make a feoffment; but he must counterplead the seisin of the infant and his ancestors, and the infancy shall come upon the lien.

(18) *Ne nul de ces auncesters.*] ^b Here is implied (whose heir he is) but yet this doth extend aswell to the speciall heir of the possession (as the heir in borough English, and in gavelkinde) as to the generall heir at the common law.

^c Where a bishop or an abbot be vouched, the counterplea must not be of the bishop or abbot and his ancestors, according to the letter of the law; but of him and his predecessors, according to that capacite whereby the land is demanded: and so it is of other bodies politique and corporate.

^d If a baron and feme be vouched, the seisin of the feme and her ancestors may be counterpleaded, unlesse speciall matter be shewed to the contrary: and so it is, if two others be vouched, it is a good counterplea to counterplead the seisin of one of them; for ousting of delay by essoine, protection, death, and his heir within age, &c.

(19) *Ne unques avoient seisin de la terre out tenement, &c. per que il poet aver, &c. seoffe.*] ^e Yet if he hath but an estate for yeers, it is sufficient; for by the livery he gaineth seisin, and both the feoffments *de jure* and *de facto* are within this statute, but otherwise it is of an estate at will.

If the vouchee hath but an estate for life, so as his feoffment should be a surrender, yet hath he such an estate, as is within this statute.

12 E. 3. Count.
de Vouch. 92.
27 H. 6. 1.

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The third
counterplea
given by this act.

12 E. 3. Count.
de Voucher. 42.

^a 21 E. 3. 9. 31
E. 3. Count de
Vouch. 88. Dy-

er. 13 El. 290.
^b 10 E. 3. 30.

18 E. 3. 26.
38 E. 3. 22.

40 E. 3. 14. 23.
43 E. 3. 19.

27 H. 6. 1.
35 H. 6. 34.

22 E. 4. 10.
20 H. 7. ibid.

^c 40 Ass. 22.
19 E. 2. Count.

de Vouch. 114.
6 E. 2. Vieu.

162. Temps. E.
1. ib. 171.

^d 22 Ass. 30.
48 E. 3. 28.

18 E. 3. 53. 54.
47. 39 E. 3. 30.

32. 16 H. 7. 13.
20 H. 7. ibid.

^e Temps. E. 1.
fic. Count de

Vouch. 116.
50 E. 3. ibid.

124. 16 E. 3.
Count de Garr.

36. 37. 18 E. 3.
Issue 36. 40 E. 3.

12, 13. 44 E. 3. 27. 13 E. 3. Count. de Vouch. 36. 8 H. 7. 5. 21 H. 6. Count. de Vouch. 3. 14 H. 6. 10.
Husband

Husband *cesti que use* in the right of his wife, or seised in the right of his wife, hath a seisin *dont il poet feoffment faire*, a feoffment for maintenance, though the statute of 1 R. 2. make it void, yet seeing it is not void untill entry, it is a sufficient seisin to make a feoffment.

† One joyntenant cannot enfeoff another, yet hath he such a seisin as is within this act; for [*feoffment faire*] is spoken but for example; but a fine, release, or any other conveyance which giveth an estate, is within this law.

If a vouchee or any of his ancestors had any seisin, though it were avoided or determined, it is sufficient.

(20) *En demaunde.*] ‡ If a rent be demanded, and the tenant vouch by reason of a feoffment of the land discharged of the rent with warranty, the demandant may counterplead the seisin of the vouchee, &c. of the land, albeit the rent is onely in demand.

(21) *No fee, ne service per la maine le tenant, ou ascun de ses auncesters, &c.*] ^h For in respect of some tenure and service, the tenant may vouch to warranty; as frankalmoigne, homage, auncestrel, reversion, &c.

(22) *Puis le tēps celuy de que seisin le demand' cōute.*] ⁱ Here [seisin] is taken for the title of the demandant in his writ, for it is a maxime in counterpleas, that the demandant is not to counterplead any seisin, but after the title of his writ; and where the seisin is in the title, there the counterplea must be after that seisin: as for example, in a writ of right, after the seisin of him of whose seisin he demand.

Here is implied (and before the writ purchased) for if it be *pendente brevi*, it ought not to be allowed.

(23) *Iesq; le temps que le briefe fuit purchase & plea move.*] * For no warranty, created after the purchase of the writ, shall delay the plaintife, unless upon that conveyance the writ be made good; as if a *præcipe* be brought against A. of land whereof B. is seised, and B. infeoffe A. hanging the writ, he shall vouch by force of this warranty, otherwise not.

(24) *Soit le tenant bote cūst' al aut' respons.*] Of this sufficient hath been said before.

(25) *Lavantdit exception eyt lieu en briefe de mordanc', & en les autres briefs devant nosmes auxy bien come in briefs queux touchant droit.*] By this clause, the demandants in writs of possession, as the *mordauincester*, *cofinage*, *aiel*, *nuper obiit*, *intrusion*, and the like, have a greater privilege and advantage, then demandants in actions which touch the right; for this act gives the demandants in writs of possession, not onely the first counterplea, that is, that the tenant or his ancestor was the first that entered, &c. but also the last counterplea, which is given in writs touching the right, *viz.* that neither the vouchee, nor any of his auncesters had ever any seisin, &c.

(26) *Et si le tenant per case eyt charter de garrantie de auter home, que soit obligé in nul des avantdits casz, &c.*] If any man be ousted of his voucher by this statute, yet if he hath a charter of warranty, he may have his writ of *warrantia chartæ*; as if a man that never had any thing in the land, nor any of his ancestors before him, releaseth to the tenant of the land with warranty, if the tenant vouch him, and the demandant counterplead the voucher, by the last

44 E. 3. Count. de Vouch.

45 E. 3. 16. 14.

35 H. 6. 10.

9 H. 6. 49. 8 H.

7. 5. 50 E. 3.

tit. Count. de

Vouch. 124.

8 3 E. 3. 36.

5 E. 3. 16. 37.

10 E. 3. 20.

26 H. 6. Count

de Vouch. 5.

12 R. 2. ibid. 34.

35 H. 6. 30.

21 E. 4. 26.

^h Fleta, li. 6. c.

23. 13 E. 1.

Count. de

Vouch. 118.

47 H. 3. Vouch.

270, 271. 9 H. 3.

ibid 277. 1. part.

Instit. sect. 143.

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1 13 E. 3. Count.

de Vouch. 118.

6 E. 3. 21. 38 E.

3. 28. 39 E. 3. 36.

41 E. 3. 15.

46 E. 3. 32.

48 E. 3. 2.

11 H. 4. 19.

22 H. 6. 42.

21 E. 4. 20.

21 E. 3. 20.

21 E. 4. 26.

12 H. 7. 2.

* 8 E. 3. 40.

28 E. 3. 90.

41 E. 3. 5.

12 R. 2. Count.

de Vouch. 33.

18 E. 4. 27. a

simile.

12 H. 7. 2. b. per

Wood & 3. per

Brian.

Instit. 1. part.

sect. 743. More

of this matter.

last branch of this act, *viz.* that the vouchee, nor any of his ancestors had ever any seisin, &c. and the vouchee is not there present, to enter into warranty; in that case the tenant shall be ousted of his voucher, but may have his writ of *warr' chartæ*. So if a man after the death of my ancestor abate, and make a feoffment in fee, and after purchase the land again with warranty, and after is impleaded in an assise of *mortdancer*, he shall be ousted of his voucher by the first branch of this act, because he was the first that entred, &c. but he may have his *warrantia chartæ*. So if a disseisor make a feoffment in fee to A. who infeoffeth B. and after repurchase the land of B. with warranty, against whom the disseisee brings a writ of entry in the *per*, as he may do, he cannot vouch B. by the second branch of this statute, but the disseisor onely, and is driven to his writ of *warrantia chartæ* against B.

It is to be known, that there are counterpleas to the voucher, and that this statute giveth to the demandant, against the tenant in three cases, as hath been said.

And there is a counterplea to the warranty, or to the lien (which is all one) and that is between the tenant and vouchee, whereof there is no occasion given to treat at this time; for this act deals not in any fort with it.

There were at the common law divers counterpleas of the voucher, to prevent or to oust the demandants delay, whereof it is not impertinent to say somewhat.

It was a good counterplea at the common law, to say, that there was *nul tiel*, as the vouchee; and that the statute of 14 E. 3. cap. 18. was in affirmance of the common law.

* So it is, if one be vouched as heir within age, and that the parol may demur, to say, that he is a bastard; so it is, to say that the vouchee is villein to the demandant.

It was a good counterplea at the common law, to say that the vouchee was dead, but upon this distinction, that the demandant shew the same before any processe awarded; for after processe awarded, it must come in by the return of the sherife: and that the statute of 14 E. 3. ca. 18. was made but in affirmance of the common law, for it was adjudged in 5 Edw. 3. a good counterplea.

And so it is, if two be vouched, it is a good counterplea, to say, that one of them is dead for preventing of delay.

In dower, it is a good counterplea, to say, that the tenant entred by her husband.

It is a good counterplea of the voucher, to say, that the tenant hath formerly prayed in aid of him, in respect of the delay.

In all cases, where one doth vouch out of common course, there the tenant ought to shew cause.

And whensoever the tenant cannot be admitted to his voucher without shewing of cause, there by the common law the demandant may counterplead the cause.

When one voucheth himself, for saving of his estate tail; or when he voucheth himself as heir, and his brother as tenant in borough English, because it is out of common course, the tenant must shew cause, and the demandant shall have a counterplea to the cause.

In a *præcipe*, the tenant vouched two brethren as one heir, and that the youngest was within age; and because it was out of com-

mon

7 E. 3. 27. 7 Aff.
4. 28 E. 3. 96.

* 14 H. 6. 10.
48 E. 3. 17.
14 E. 3. Count.
de Vouch. 67.

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40 E. 3. 36.
25 E. 3. 43.
17 E. 3. 41.
21 E. 3. 36.
7 F. 3. 27.
5 E. 3. 35.

39 E. 3. 32.

13 E. 3. 55.

3 E. 3. 38. 6 E. 3.
18 E. 3. Vouch. 7.
52 E. 3. ibid. 99.
7 H. 4. 11 H. 4.
21. 22 H. 6. 19.

24 E. 3. 37. 25 E.
3. 53. 40 E. 3.
14. 41 E. 3. 21.
44 E. 3. 38.
38 E. 3. 4. 29 E.
3. 29. 32 E. 3.
Vouch. 96.
10 H. 7. 21. 22.
10 H. 7. 13.
43 E. 3. 19.

mon course, he was ruled to shew cause; and shewed, that the father was seised of lands in gavelkinde, and that the same descended to them, and the demandant counterpleaded the cause.

So it is, if a *præcipe* be brought by four, and two be summoned and severed, the tenant cannot vouch them that be summoned and severed, without shewing cause for the reason aforesaid; and the cause being shewed, the demandant shall counterplead the same.

In a *præcipe* against two they cannot vouch severally without shewing of cause, because it is out of common course, that jointenants should vouch severally without shewing of cause: which cause the demandant shall counterplead by the common law; and so in all other cases, whereof there are plentiful authorities in our books.

See more of this matter in the first part of the Institutes, cap. Garrantie.

4 E. 3. 13.
11 H. 4. 16.
21. 43.

42 E. 3. 16. 3 E.
3. 8. 12 H. 7.
2. 3. 3 E. 3. 38.
8 E. 3. 61. 17 E.
3. 61. 62.
25 Aff. Pl. ult.
31 E. 3. Vouch.
24. 44 E. 3. 18.
14 H. 6. 10.

C A P. XLI.

DE serements des champions (1), est issint purview: pur ceo que rarement avient que le champion le demandant ne soit perjure en ceo quil jure, que il ou son pier veist la seisin son seignior, ou de son auncestour, et que son pier luy commande a faire la darreign' (2), que desormes ne soit le champion le demandant constreint a ceo jurer (3), mes soit le serement garde en tous ses auters points.

TOUCHING the oaths of champions, it is thus provided, because it seldom happened, but that the champion of the defendant is forsworn, in that he sweareth, that he or his father saw the seisin of his lord, or his ancestor, and that his father commanded him to dereign that right; that from henceforth the champion of the demandant shall not be compelled so to swear: nevertheless his oath shall be kept in all other points.

At the common law none could be a champion for the demandant, but such an one, as either himself saw, or heard his father say, that he saw the seisin of the demandant or his ancestor, and that his father commanded him to testifie the right, and that this was true, he took a corporall oath: but oftentimes the demandants seisin was so ancient, as seldom any man could take that oath, and yet in these cases, champions in those times took the oath, though they knew it not, either *ex visu*, or *ex auditu*, &c. and therefore as this act faith, were perjured.

Glan. li. 2 c. 3.

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(1) *Des serements des champions.*] Champion, *campio dicitur à campo*, because the combat was stricken in the field, and therefore is called campfight, and he must be *liber homo*, a free man.

This triall by champion in a writ of right hath been anciently allowed by the common law, and the tenant in a writ of right hath election either to put himselfe upon the grand assise, or upon the triall by combat by his champion with the champion of the demandant, which was instituted upon this reason, that in respect the tenant had lost his evidences, or that the same were burnt or imbezeled, or that his witnesses were dead, the law permitted him to try

Brañ. l. 5. f. 344.
9 H. 3. Flet. l. 6.
cap. 9. in fine.

try it by combat between his champion, and the champion of the demandant, hoping that God would give victory to him that right had, and of whose party the victory fell out, for him was judgement finally given, for seldome death ensued hereupon (for their weapons were but batounes) victory only sufficed.

Brac. l. 3. f. 141.
b. 4 E. 3. 41. 17
E. 3. 2. 29 E. 3.
12. 30 E. 3. 20.
9 H. 4. 3.
1 H. 6. 6. 9 E. 4.
35. 19 H. 6. 35.
21 H. 6. 4.
14 E. 4. 7. 13 El.
Dier 301. See
the first part of
the Inst. sect.
489 & 514.
* Of the French
word, enlascie.
i. intangled, or
ensnarled.
Brac. l. 3. f. 138.
b. Mirror, c. 1.
§ 3. Flet. l. 1. c.
32. Bract. l. 3. f.
141, 142.
Brit. 41. fo.
Fleta ubi supra.
Mir. c. 3. ordinatio
pugnantium.

Now concerning the oath of the champions, and the solemn manner and order of proceeding therein, and between what parties triall by battell should be joyned, you may reade in the statute of W. 2. cap. 41. and at large in our books; and the oath of the champion, as well of the tenant as of the demandant continued since this statute, followeth in these words:

Hearre this you judges, that I have this day, neither eate, drunke, nor have upon me either bone, stone, ne grasse, or any inchauntment, forcery, or witchcraft, where through the power of the word of God might be * increased or diminished, and the Devils power increased, and that my appeale is true, so helpe mee God and his Saints, and by this booke.

The law doth allow a triall by battell in another case, and that is in case of life in an appeale of felony, the defendant may choose either to put himselfe upon the country, or to try it by body to body, that is by combat between him and the plaintiffe, but there the parties themselves shall fight.

And it appeareth by our auncient authors, *Quod si appellatus se defenderit contra appellantem tota die usque horam qua stellæ incipiunt apparere, tunc recedat appellatus quietus de appello.*

And in case of the writ of right, the champions are not bound to fight but untill the starres appeare, and if the champion of the tenant can defend himselfe untill the starres appeare, the tenant shall prevaile, for they shall combat but once, and it is sufficient for the tenant to defend being in possession.

The judges of the court of common pleas are judges of the battell in a writ of right, and the judges of the kings bench in an appeale of felony. But if the cause of appeale be not determinable by the common law, but before the constable and the marshall according to the civill law, there the constable and marshall are judges.

But this triall in an appeale at the common law of later times seldome come in use, for that the appellant procures the appellee to be indicted, and then he cannot try it by battell: * but if the indictment be insufficient, then the defendant may try it by battell.

Now the auncient law was, that the victory should be proclaimed, that he that was vanquished, should acknowledge his fault in the audience of the people, or pronounce the horrible word of *cravent* in the name of recreantise, &c. and presently judgement was to be given, and after this the recreant should *amittere liberam legem*, that is, he should become infamous, and should not be accounted in that respect *liber et legalis homo*, and therefore could not be of any jury, nor give testimony as a witnesse in any case, because he is become infamous, and of no credit: and this doth notably appeare in an ancient record, where the case was, that battell being joyned in a writ of right of advowson, in anno 55 H. 3. before the justices in eyre in the county of Northampton, and the champions combating, Philip le Pugil champion for one of the parties was vanquished, and thereupon proclamation made accordingly:

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Rot. Pat. anno
55 H. 3. m. 3.
Pugil a cham-
pion.

ingly: the king by advice of his counsell reciting under his great seal the joyning of battell in the said writ of right of advowson, and the proceeding thereupon did signifie, *Quod in duello prædicto coram iusticiariis prædictis percusso, irruerit in eundem Philippum tanta multitudo hominum, unde oppressus se defendere non potuit, qui homines perpetuam defamationem sibi imposuerunt, et in eodem duello creatiam proclam: rex inde certior factus, &c. statuit quod prædictus Philippus propter creatiam prædictam liberam legem non amitteret, &c.*

Vide Mic. 15 E.
1. Rot. 8. in
Banco Norff.
Duellum percus-
sum, & serviens
Abbatis de Bury,
tenentis devictus
& interfecit.
Vide Mich. 3 E.
1. Rot. 19.
Flet. li. 1. c. 32.
See li. 9. f. 32. b.
Le case del Ab-
bot de Strata
Marcella.
Deuter. cap. 13.
ver. 10.
Glanv. ubi supra.
Braet. li. 5. fo.
373.

Of this triall by battell, Fleta saith thus, *Duellum singularis pugna inter duos ad probandam veritatem litis, et qui vicerit probasse intelligitur; et quamvis iudicium Dei expectetur ibidem, quicumque tamen innoxiam, i. singularem pugnam, sponte suscepit, vel obtulerit, homicida est, et mortale contrahit peccatum.*

(2) *Sen pier luy commande a faire la dereign'.*] And these words are well explained by Glanvill, *Cui pater suus injunxit in extremis agens, in fide qua filius tenetur patri, quod si aliquando loquelam de terra illa audiret, hoc dirationaret, sicut id quod pater suus vidit et audiuit.*

(3) *Ne soit le champion le demandant constreint a ceo jurer.*] Hereby it appeareth that preventing justice is better then punishing justice, *melior est justitia verè præveniens, quàm severè puniens*; for when it is punished, yet the offence is committed, but when it is prevented, then there is neither offence nor punishment: this law preventeth perjury, which taketh away that part of the oath which seldom or never was or could be kept.

C A P. XLII.

PUR ceo que en brieve daffise, dataints (1), et de juris utrum (2), les jurors sont souvent travels per effoines des tenants: purview est, que del heure que le tenant (3) un foits apparust en court, jammes ne puisse le tenant se essoine (4), mes faire son attourney a fuer pur luy (5), sil voile. Et si non, soit lassise, on le jurie prise per son default.

FORASMUCH as in a writ of affise, attaints, and juris utrum, the jurors have been often troubled by reason of the effoins of tenants; it is provided, that after the tenant hath once appeared in the court, he shall be no more effoined, but shall make his attorney to sue for him, if he will; and if not, the affise or jury shall be taken through his default.

(Fitz. Effoin, 52. 55, 56. 63, 64. 13 Ed. 1. stat. 1. c. 28.)

The mischief doth appeare by the preamble, and that the rather, for that in these actions here rehearsed there is a jury retourned the first day, and therefore the delay of the jurors was the greater, but of two mischiefs, one onely remedy was provided; for as great delay had the jurors where the demandant, as where the tenant was effoined, and here provision is made for the effoine of the tenant which was the greater mischief, for commonly the tenant seeks delay, and the plaintifes expedition; *petens præsumitur desiderare potius instantiam litis, quam dilationem.*

Braet. li. 5. fo.
342.

This

Britton, f. 164.
 Floet. li. 6. c. 9.
 10 H. 6. 22.
 14 H. 6. 22.
 2 Aff. 22. 22 Aff.
 79. 30 Aff. 51.
 34 Aff. 6.
 6 E. 3. 25.
 44 E. 3. 5.
 44 Aff. 24.

30 Aff. p. 5.
 8 Aff. p. 22.

W. 2. ca. 28.
 26 Aff. p. 35.
 45 Aff. 2. 30 H.
 6. 1. 16 Aff. 10.
 26 Aff. p. 25.
 34 Aff. p. 6.

6 E. 3. 25.
 22 Aff. p. 79.
 23 Aff. p. 15.

12 E. 1. effoin
 175. 4 E. 3. 34.
 6 E. 3. effoine
 55.

F.N.B. 25.
 Brit. 285, 286,
 287, &c.
 Merton, ca. 10.
 Gloc. cap. 8.
 W. 2. ca. 10.
 27 E. 1. de terris
 amortisand.
 Stat. de York.
 12 E. 2. cap. 1.
 15 E. 2. Stat. de
 Carlisle. 3 H. 7.
 c. 1. 23 H. 8.
 cap. 3, &c.
 In the preface to
 the fourth book,
 and here before,
 cap. 26.

This act is not understood of a writ of assise *de novel disseisin*, for that in that writ, the tenant shall not be eslined, neither before, nor after appearance, *locum non habet effoinum in persona disseisitoris, vel redisseisitoris*; but this is intended of an assise of *mordaucestre*, and it is said, that the justices of the kings bench will not allow an effoine for the plaintiffe in no manner of assise, nor for the tenant in assise of *mordauce*.

But albeit no effoine for the tenant doth lie in assise of *novel disseisin*, yet if the same be discontinued by the *non venu* of the justices, or by the demise of the king, in a reattachment the tenant shall be eslined, and so shall the tenant be in a resummons after a discontinuance in assise of *mord*.

An assise of *mord*. was brought in Chester, the tenant vouch'd a foreiner to warranty, whereupon the record was removed into the court of common pleas, 15 Pasch. at which day (though it be in an assise of *mord*.) the tenant may be eslined, for the plea in bank is not the plea of assise, but the plea theré is onely upon the warranty, for the assise shall not be taken in bank.

The statute of W. 2. doth provide for the other mischiefe in the case of assise of *mord. attain*, and *juris utrum, viz.* that the demandant therein after appearance shall not be eslined; but that statute extendeth not to the assise of *novel disseisin*.

(1) *Dattaints.*] This statute is intended of the tenant in an attainst as well in a plea personall, or mixt, as upon a plea meerly in the reality.

(2) *Juris utrum.*] See the statute of W. 2. abovesaid.

(3) *Que le tenant.*] This doth extend as well to the tenant in law, as the vouchée, and tenant by receipt, as to the tenant in deed, for it is to oust delay for expedition of justice, and for the ease and benefit of the jurors, and therefore being in equall mischiefe shall be within the same remedy.

Hereby it appeareth that this statute provideth onely against the tenant after appearance, and leaveth the effoine of the plaintiffe (as hath been said) at large.

(4) *Se effoine.*] Though here effoine be spoken indefinitely, yet is it to be taken in a common sence, and therefore is it to be understood of a common effoine, and not of an effoine *de service le roy*, for *statuta per regem, dominos, et communitatem regni ordinata in communi, et vulgari sensu intelliguntur*.

(5) *Mes fait son attourney a suer pur luy.*] By the policy of the common law, that suits might not encrease and multiply, *cum lites potius restringendæ sunt, quam laxandæ*, both plaintiffe, and defendant, demandant, and tenant in all actions reall, personall, and mixt did appeare in person, as well in courts of record, as not of record, because the writs doe command the tenant or defendant to appeare, which was alwayes taken in proper person; and the entry in every action for the demandant or plaintiffe is, *et prædictus petens, or querens obtulit se 4. die*, which was ever understood in proper person: but when this and other statutes had given way to appeare by attourney, it is not credible how (with attourneys and their multiplication) suits in law (for the most part unnecessary and for trifling causes) when the parties themselves might sit quiet at home, increased and multiplied: so dangerous and ill successe have ever had the breach of the maximes and auncient rules of the common law, as elsewhere hath been observed.

It

It appeareth in Glanvils time, that the justices admitted the parties, *per responsalem loco suo ad lucrandum vel perdendum*, but then onely when the parties themselves were present, for he saith, *Verum oportet eum esse presentem in * curia, qui responsalem ita in loco suo ponit: et nota differentiam inter responsalem et attornatum.*

And the Mirror speaking of the auncient law before the statute saith, *Abusion est a receiver attourney, ou nul poier est a cco done per briefe en la chauncery: et abusion est a receiver attourney, ou le parol nest my attaine per presence des parties, &c.*

After this in divers parliaments it was thought good to decrease the number of attourneys, finding them to be the causes of multiplication of suits. But though divers good laws have been made therein, yet the number of them daily increaseth, to great inconvenience in the common-wealth, and to the no small blemish and discredit of that auncient and necessary vocation.

Glan. li. II. c. 1.
Bract. lib. 5. fo.
353, 360.
Mitr. c. 2. § 21.
Des Attornies.
See the first part
of the Institutes,
sect. 196.

Rot. Parl.
20 E. 1. De
Attournatis.
4 H. 4. ca. 14.
33 H. 6. ca. 7.

CAP. XLIII.

PUR ceo que les demandants (2) sont souvent delayes de tout droit, pur ceo que ou sont plusieurs parceners tenants (3), dont nul puit respoign' sans autre, ou quil ad plusieurs tenants jointment seoffes (4), ou nul ne sciet son several, et ceux tenants sont forchient per effoine (1), issint que chescun eit un effoine: purview est desormes, que ceux tenants neient effoine, forsque a un jour, nient plus que un sole tenant naveroit, issint que jammes ne puissent forcher, forsque tant solement aver un effoine.

FORASMUCH as demandants be oftentimes delayed of their right, by reason that many parceners be tenants, of which none may be compelled to answer without the other, or there may be many jointly infeoffed (where none knoweth his several) and such tenants oftentimes fouch by effoin, so that every of them hath a several effoin; it is provided, that from henceforth such tenants shall not have effoin, but at one day, no more than one sole tenant should have; so that from henceforth they shall no more fouch, but only shall have one effoin.

(Hob. 8. 46. Fitz. Effoin, 82. 119. Fitz. Fourcher, 3, 4. 10. 13, 14. Bro. Fourcher, 20. 6 Ed. 1. stat. 1. c. 10.)

(1) *Forchient per effoine.*] The true understanding, what it is to fouch by effoin, doth open both what was the mischief before, and what is remedied by this statute.

Fourcher by effoine, on the part of the tenant, is when a *præcipe* is brought against two or more tenants, and after each of them have had one effoine, which is due to them by law, they over again delay the demandant by successive effoines.

For example, a *præcipe* is brought against A. and B. A. is effoined, and B. appears, and hath *idem dies* given him; at which day A. appears, and B. is effoined, this is lawfull, but then at that day B. is effoined again, and C. appears, *et sic vicissim et alternis vicibus*, this is called fourcher by effoine, and so it is explained in our books.

Bract. l. 5. f. 342.
33 H. 6. 25.
2 E. 4. 19.

39 H. 6. 28, 29.
See hereafter
verbo Tenants.

This

Fleta, li. 6. c. 9.
Britton, f. 184.

This doth Fleta comprehend in few words, and rendreth to fourch by effoine *essoniare vicissim*: for he saith, *Si autem plures fuerint tenentes pro indiviso provisum est, quod non essonientur vicissim, sed simul ad unicum diem, sicut fuissent unum corpus ratione unitatis juris, et hereditatis.*

To fourch in one of the significations is to divide, and because they divide themselves in delay of the demandants by effoines and appearances interchangeably, it is called *fourcher per effoine*.

a E. 4. 19.

Now this mischief was not that every one of the tenants should not have one effoine, but that there should be a fourcher, a vicissitude of effoines after each of them have had one effoine. So as this act doth onely prohibite the fourcher by effoine, which was used for delay, and not one onely effoine, as hath beene said, which is lawfull and necessary.

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20 E. 2. Four-
cher 1. 16 E. 3.
ibid. 9. 38 E. 3.
1. 12 H. 4.
14 H. 4. 37.
3 H. 6. 36.
8 H. 6. 15.
9 H. 6. 21. 44.
22 E. 3. 5. 38
E. 3. 12. 18.
48 E. 3. 20.
Gloc'. ca. 20.
3 H. 6. 36. F.
tit. Fourcher 3.
44 E. 3. 38.
Dyer 28 H. 8.
25.

(2) *Demandants.*] This act doth extend onely to reall actions in respect of this word *demandant*, which is proper to reall actions; and the words be also, Where be divers parceners tenants, or tenants joyntly infeoffed, and those tenants fourch by effoine; for as this act extendeth to actions in the realty.

But this statute extends not to an action of debt upon an obligation, covenant, or other like personall actions.

(3) *Tenants.*] This act is to be understood after apparance, and so doth the statute of Gloc' recite it, for there is no fourcher but after former effoins and reciprocally apparance, as hath been said; and this doth also prove what fourcher is.

This statute being made for expedition of justice, and for ousting of delays is benignly interpreted; for in a writ of annuity against a parson, he prayeth in aid of the patron and ordinary, and they, after each of them have had one effoin, would have fourched by effoin, and could not by the rule of the court; and yet the price in aid is no party to the writ.

And this statute is made against the fourcher by effoin of the tenants, and not of the demandants.

(4) *Parceners et jointment seoffes.*] This statute speaking expressly of parceners and jointenants, extends not to baron and feme seised in the right of the wife, which is remedied by the said statute of Gloc': but where baron and feme be joyntly infeoffed, they are within the purview of this statute: all jointenants are within this statute, although their estate be created by any other conveyance then by feoffment.

Bract. ubi supra.
33 H. 6. 25.
Flet. ubi supra.
Gloc' ca. 10.
6 E. 1.

C A P. XLIV.

PUR ceo que multes des gentes se sont fausement effoine (1) de oustre le mere (2), la ou ils fuerent en Engleterre le jour de le summons: purview est desormes, que cel effoine ne soit pas de tout allow, si le demaundant le challenge, et soit prist d'averrer (3) quil fuit en Engleterre le jour que le summons fuit

FORASMUCH as divers persons cause themselves falsly to be effoined (for being over the sea) where indeed they were within the realm the day of the summons; it is provided from henceforth, that this effoin be not always allowed, if the demandant will challenge it, and will be ready to aver

fuiſt fait, et iii. ſemaignes apres (4): mes ſoit ajourne en ceſt forme, que ſi le demandant ſue a tiel jour averment per pais, ou ſicome la court le roy agardre et ſoit attaint que le tenant fuiſt deins le quater meres Dengleterre (5) le jour que il fuit ſummons, et trois ſemains apres, iſſint que il puit eſtre reaſonablement garny de la ſummons (6), ſoit leſſoine turne en un default (7), et ceo fait a entend^r tantſolement devant les juſtices le roy.

aver that he was in England the day of ſummons and three weeks after; but ſhall be adjourned in this form: that if the demandant be ready at a certain day, by averment of the country, or otherwiſe as the court ſhall award, to prove that the tenant was within the four ſeas the day that he was ſummoned, and three weeks after, ſo that he might be reaſonably warned by the ſummons, the eſſoin ſhall be turned into a default; and that is to be underſtanden only before juſtices.

Of the diverſity of eſſoins, and amongſt them, of this eſſoin, called here *ultra mare*, you have heard before in the expoſition of the ſtatute of Marlebridge: for the better underſtanding of the miſchief before this act, and of the purview thereof, it is neceſſary to underſtand the diverſity of eſſoins *ultra mare*; ſome of which, ancient authors call *eſſoins de ſervitio regis æterni*: and ſome, de *ſervitio regis temporalis*: of the firſt ſort were, viz. *ad terram ſanc-tam*. And this was two-fold, viz. *Cum peregrinatio vel paſſagium generale fuerit ad terram ſanc-tam, et tunc recedant partes ſine die, quouſ-que eſſoniatuſ redierit, vel obierit, &c.* *Semper tamen non habet locum iſtum eſſonium, quia non niſi tempore tranſfretationis alicujus regis cum peregrinatione publica et generali, aut cum ſimplex fuerit, dabitur eſſoniato terminuſ uniuſ anni et uniuſ diei.*

Marlebridge,
cap. 12.

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Bract. lib. 5. fo.
338, 339 Fleta,
lib. 6. cap. 8.
Brit. cap. 123.
Bracton } ubi
Britton } ſupra.
Fleta }
3 E. 3. 29 Acc.

Mirror, cap. 2.
§ 20. de Eſſoins.

Et ſi ſimplex ſit peregrinatio, et ultra annum et diem moram fecerit ultra mare, excuſatur ejuſ abſentia ſecundum quodaſ per eſſonium ſimplex de ultra mare, et ſic habebit ſpaciũ 40. dierũ et uniuſ ſud et uniuſ ebbe; et ſi adhuc moram longiorem protraxerit, habet eſſonium ſimplex de malo veniendi citra mare, per quod habebit ad minuſ ſpaciũ 15. dierũ quod verũ eſt ad minuſ habebunt eſſoniati tantũ tempuſ et ex cauſa majuſ tempuſ ſecundum diſcretionem juſticiariorũ. Et quid ſi tunc non venerit? procedatur ad default contra eũ, niſi forte contingat talem eſſoniari de morte ad cautelam. Si quiſ autem eſſoniatuſ fuerit eſſonio de ultra mare citra mare Græcorũ quod proſectuſ ſit in ſervitio domini regis æterni in peregrinatione alia quam ad terram ſanc-tam, ſicut apud Sanctũ Jacobũ, vel alibi, datur dilatio ad minuſ quadraginta dierũ et uniuſ ſud et uniuſ ebbe ad excuſationem eſſoniati de ſimplici eſſonio de ultra mare, &c. And after he ſaith, *In hoc caſu induciæ ſunt arbitrarie dum tamen ad minuſ quadraginta dierũ ut ſupra.* And Fleta further ſaith, *Eſſonia autem ultra mare Hiberniæ et Scotiæ vertenda ſunt in eſſonium de malo veniendi 1. per 15. dieſ.*

Mirror.
Bracton } ubi
Britton } ſupra.
Fleta }

Fleta ubi ſupra.
7 E. 4. 27.

Glanv. li. 1. c.
25.

Idem li. 1. c. 29.

And Glanville, who wrote before all theſe, ſaith, *Eſt aliud genus eſſoniandi et neceſſarium, cum quiſ eſſoniat ſe de ultra mare, et tunc ſi recipiatur eſſonium, dabuntur ipſi eſſoniato ad minuſ quadraginta dieſ, &c.* And ſpeaking of eſſoins, by reaſon of peregrination, he ſaith, *Si verſuſ Jeruſalem iſerit iſ qui ſe eſſoniare facit, tunc ſolet ei dari reſpectuſ uniuſ anni et uniuſ diei ad minuſ, &c.*

By theſe ancient authors it appeareth, what delay this eſſoine de ultra mare wrought to the demandant; and by the law no averment could be had againſt it, no more then in a protection, or in

Ubi supra.

the *essoine de service le roy*, which (specially in those dayes when such *essoines de ultra mare* were so frequent) was vere mischievous; for some fained such a passage or peregrination, and some went of purpose after the purchase of the *præcipe*, which is well expressed by Fleta: *Sunt tamen quidam, qui cum fuerint brevia super ipsos impetrata, extra regnum se divertunt, ne summonitione sint præventi ut sic jus petentis per essonium de ultra mare deferri possit, et unde provisum est, quod si petens offerat verificare, quod tenens fuerit in Anglia die summonitionis, et per tres septimanas sequentes, adjournetur essonium, et irrotuletur calumnia petentis, et si alia die constare possit justitiariis per inquisitionem, vel alio modo, quod tenens fuit in Anglia die summonitionis, et per tres septimanas sequentes, ita quod potuit rationabiliter præmuniri, vertatur illud essonium in defaultam, sed hoc observetur tantummodo coram justitiariis.*

Mirror, ca. 5.
§ 1. & 4.

(1) *Font fauxment essoine.*] All falshood is abhorred in law, and therefore the Mirrour said well, *Abusou est que faux causes de essoine sont de cy que droit ne allowe fauxime en aucun cas*; the law alloweth no falshood in any case, which is a maxime of the common law, *contra veritatem lex nunquam aliquid permittit.*

21 H. 6. 20.

(2) *Essoine de oustre mere.*] This act doth extend onely to the *essoine de ultra mare*, whereof we have spoken at large, and not to the *essoine de servitio regis*, &c. *Vide* 21 H. 6. fol. 20.

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Stat de 33 E. 1.
de prot. 28 H.
6. 3. 21 H. 6. 20.
39 E. 3. 35.
47 E. 3. 6.
1 H. 6. 6.
34 H. 6. 62.
35 H. 6. 5. 8.
19 H. 6. 35.
5 E. 4. 2.
21 E. 4. 20.
a Regist. fol. 18.
F. N. B. 17. H.
b Gloc. cap. 8.

(3) *Et soit pris d'averrer, &c.*] This averment, as hath been said, could not be taken by the common law, no more then in case of a protection before the statute of 33 E. 1. which giveth an averment in case of protection; of which statute you shall read in our books, and how the protection may be repealed; and in the common *essoine de malo veniendi*, or de *service le roy*, no such averment can be taken against it. ^a But if the tenant be essoined in any action *de servitio regis*, where in truth he is not in the kings service, then the demandant or plaintife may sue a ^b speciall writ out of the chancery directed to the justices, rehearsing, that he is not in the king service, and commanding them to proceed; then the *essoin* shall not be adjourned, but shall be quashed presently.

And so before this statute in the *essoine de ultra mare*, if the party were in England, the demandant might have purchased the like writ, as is abovesaid; but for that many times that could not be obtained without great difficulty, this averment was given for avoiding of falshood.

(4) *Jour que le somons fuist fait, et per tres semaines apres.*] For the summons alwayes is made upon the land by two sumners, whether the tenant, or any for him, be there or no.

The day of the summons is not counted parcell of the three weeks, but it must be three weeks after that day; otherwise had it been, if the words had been, three weeks after the summons made.

(5) *Deins le quater meres d'Angleterre.*] Within the four seas, is as much to say, as within the jurisdiction of the king of England; for all within the four seas was either part or holden of the crown of England, as by many ancient records appeareth.

(6) *Que il puit estre raisonablement garny de la summons.*] The three weeks after the day of the summons were given as a reasonable time, wherein by common indentment he might have notice of the summons made upon his land.

(7) *Soit lessoine turne en un default.*] This is the remedy given by this act, for the benefit of the demandant, who was unjustly delayed by this essoin.

A woman tenant in a writ of entre, &c. was essoined, for that she was in *terra sancta*, viz. from the time of the essoin, for a year and a day; and it was said, that the tenant should lose her land, if it be found by inquest, that she was in England the day of the essoin; and there it is said, that at the day that the parties have by the essoin, the demandant shall be received to aver his challenge. Consider well this book, and the book also of 28 H. 6. which expounds the statute of 33 E. 1. *Vide* Raft. Pl. fol. 297. See more for the antiquity of essoins, and great variety of matter, both of this essoin and of all other, in the *Mirror*.

3 E. 3. 29.

28 H. 6. 3.

Mirror, cap. 1:
§. 3. cap. 2. §.
20. de Essoins.
cap. 5. §. 1.

And though this kinde of essoin is this day out of use, yet have I spoken of the same thus much for two causes: first, for that mine endeavour hath been, to explain these ancient laws, and to make every word of them so to speak, as they may be understood. Secondly, the severall points of learning that do rise out of this law (though the particular case be out of use) may serve to good purposes, you shall observe in this and many others of this nature, in this second part of mine *Institutes*.

Where the text is evident, it were losse of time to make any exposition.

CAP. XLV.

[254]

DE delays en tous maners des briefes, et des attachments (1) est purview, que si le tenant ou le defendand, apres le primer attachement tesmoign', face default, maintenant soit le grand' distresse (2) agarde. Et si visc' ne respoigne suffisamment au jour, soit grevousment amerce. Et sil maunde que il ad fait l'execution en due maner, et les issues bailes as mainpernors, adonques soit maunde au viscount, que il al auter jour face venir les issues devant justices. Et si lattachee veigne a ceo jour a savor ses defaults, eit il ses issues (3). Et sil ne veigne, eit le roy les issues (4). Et les justices le roy (5) les facent liverer a la garde (6), et justices del banke a Westmynster (7) les facent liver al exchequer, et justices en eyre, au viscount de cell' countie (8) ou ils plectent, auxy bien de cel countie, come des forreine counties, et de ceo soient charges

CONCERNING delays in all manner of writs and attachments, it is thus provided, that if the tenant or defendand, after the first attachments returned, make default, that incontinent the great distress shall be awarded; and if the sheriff do not make sufficient return by a certain day, he shall be grievously amerced; and if he return, that he hath done execution in due manner, and the issues delivered to the sureties, then the sheriff shall be commanded, that he return issues at another day before the justices; and if the party being attached come in at his day to save his defaults, he shall have the issues; and if he come not, the king shall have them; and the king's justices shall cause them to be delivered in the wardrobe; and the justices of the bench at Westmynster shall deliver them

U 2

charges en summons per rolles des justices (9).

them in the exchequer; and the justices in eyre unto the sheriff of that shire where they plead, as well of that shire, as of foreign shires, and shall be charged therewith in summons by the rolls of justices.

The mischief appeareth by this short preamble, to be delay, &c.

27 H. 6. 2.
7 H. 6. 9. Brit.
ca. 26. de attach-
ments.

(1) *Attachment.*] The attachment must be made by moveable goods, and meer personall, which may be forfeited by outlawry, and not by goods which he hath as executor or administrator, nor by a clod of the earth, nor by any chattell reall, as wardship, or the like.

Regist. judic.
fol. 1.
Brit. fol. 50. b.
48 E. 3. 26.

(2) *Grand distress.*] *Distressio magna*, it is so called, not for the quantity, for it is very short; but for the quality, for the extent is very great: for thereby the sherife is commanded, *Quod distringat tenentem, ita quod ipse, nec aliquis per ipsum ad ea manum apponat, donec habuerit aliud præceptum, et quod de exitibus eorundem nobis respondeat, et quod habeat corpus ejus, &c.*

This writ lyeth in two cases, either when the tenant or defendant is attached, and so retourned, and appeareth not, but makes default, then by this act a grand distress is to be awarded; or when the tenant or defendant hath once appeared, and after makes default, then this writ lyeth by the common law in lieu of a *petit cape*.

Brit. ubi supra.

Britton speaketh of distresses personall, which he intendeth of personall goods upon the attachment, and distresses reall, which concern the realty; and a third may be added, *viz.* distresses which do concern both the realty and personalty, as this grand distress doth.

18 E. 3. judge-
ment. 120. f.
6 E. 2. ibid.
230. 14 E. 3.
Default. 17.

In a *señla ad molendinum*, after apparance the defendant made default, whereupon a grand distress was awarded, and the defendant made default again, and thereupon the plaintife had judgement.

(3) *Et si lattachée veigne a ceo jour a savor ses defaults, eit il ses issues.*] Here the *lattachée* is taken for him that is distrained, and appeareth upon the grand distress.

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(4) *Et sil ne veigne eit le roy les issues.*] For then judgement is to be given against the defendant, as hath been said before, and the king to have the issues.

(5) *Et les justices le roy.*] That is, the justices of his bench, so called, for that all the pleas there are *coram rege*.

Ockham. 51 H.
3. stat. de Scacc.
Artic. super
Chart. 28 E. 1.
cap. 2. Fleta, l.
2. cap. 6.

(6) *Les facent liwer a le garde robe.*] There hath been an ancient officer of the kings houthold of old time, called *custos magnæ gard-robe*, warden or keeper of the great wardrobe or wardrobe, of later times called master of the wardrobe, so called, because he hath the keeping and charge of the royal robes of former kings and queens, and for providing of robes, &c. of the king: he hath also the charge of keeping and providing of hangings, bedding, &c. in standing wardrobes in the kings houses, and the delivery of velvet and scarlet allowed for liveries, &c. And many other things belong to his office, which are not necessary to be here repeated: he is accountable in the exchequer.

De

De articulis porreſtis coram domino rege per comitem mareſchallum pro hiis quæ ad officium ſuum in curia regis clamabat pertinere, dominus rex vult quod dicti articuli irrotulentur in garderoba, et quod transcriptum eorundem liberetur præſato comiti, et quod nec ipſe nec miniſtri, ſui aliquid habeant, ſeu ſibi attrahant ultra ea quæ ibidem inveniuntur, &c.

Rot. Parl. Patch.
21 E. 1. Rot. 14

Vide in the exchequer, de anno 19 E. 2. a privy ſeale bearing date 30 Junii, anno 19 E. 2. concerning his account amongſt others.

Int' communia
in Scac. de anno
19. E. 2.

But here it may be demanded wherefore theſe iſſues were to be delivered into the wardrobe; for the anſwering hereunto, it muſt be underſtood, that the kings juſtices of his bench did in thoſe dayes follow the court (the retourne of the proceſſe of which court to this day is *coram rege ubicunque fuerimus in Anglia*) therefore it was fitteſt for them to make delivery of theſe iſſues to this officer of court.

Art. Super Chart.
cap. 5.
Fleta, l. 2. ca. 2.

(7) *Les juſtices del banke al Weſtm'.*] That is, the juſtices of the court of common pleas ſhall make their eſtreats, and theſe iſſues are part of the green waxe.

(8) *Al viſcount de cel countie.*] In this particular caſe of iſſues the juſtices in eyre delivered the eſtreats to the ſheriffe, *vide* before ca. 18. which extendeth to fines and amerciaments.

W. 2. ca. 18.

(9) *Per rolles des juſtices.*] That is, particularly, and not a totall.

W. 2. ca. 18.

Vide more for eſtreats the ſtatutes of 51 H. 3. W. 2. cap. 8. 42 E. 3. cap. 9. 7 H. 4. cap. 3.

C A P. XLVI.

PURVIEW eſt enſement, et per le roy commande, que les juſtices de banke le roy, et juſtices de banke a Weſtminſter (1) deſormes per pledant les ples a terminer a un jour (2), avant que rien ſoit arraine, ou commence des ples del jour * enſuant, forſpris que leur eſſoines ſoient entres, judges, et rendus, et per encheſon de ceo nul home ſe affie, que il ne veigne au jour que don' luy eſt.

IT is provided alſo, and commanded by the king, that the juſtices of the king's bench at Weſtminſter from henceforth ſhall decide all pleas determinable at one day, before any matter be arraigned, or plea commenced the day following, ſaving that their eſſoins ſhall be entered, judged, and allowed; yet, by reaſon hereof, let none preſume to abſent himſelf at the day to him limited.

* [256]

Fiſt, in ſome impreſſions both in French and Engliſh of this act, theſe words [*Et juſtices de bank al Weſtm'*] be omitted, and towards the end theſe words [*forſpriſe leur eſſoines*] be likewiſe omitted, both which without queſtion ought to be inſerted as part of this excellent law.

The miſchiefe before this ſtatute was, in reſpect of prepoſterous or diſorderly hearing of cauſes; for many times the judges of the kings bench, and of the court of common pleas would by importunacy of great men and others in the irregular time of H. 3.

put off matters to be heard at one day untill another, and at that time heare some other matters appointed to be heard on a day following, whereby the parties, whose causes were then disappointed, were not onely delayed, and put to further charges, but many times, when their cause came to be heard, either were disappointed of their counsell which they had instructed, or the day appointed not being come, had no counsell instructed at all; and besides where witnesses were requisite, they many times failed of them: this law therefore is made to remedy these preposterous and disorderly proceedings, and to give judges a iust cause of deniall of any such requests, though never so powerfully, or importunately made, and that this law may serve for their buckler and shield, which Fleta rendreth in these words:

Fleta, li. 2. c. 29.

Et provisum est, quod iusticiarii de utroque banco placita ad unum diem adjournata perfiniant, antequam placita diei sequentis quicquam placitare incipiant, hoc tamen excepto, quod essonium illius diei supervenientis admittatur, adjudicetur, et reddatur.

And hereby it appeareth that both the said clauses so omitted, as is aforesaid, ought to be inserted. Of this kinde of hearing of causes it is truly said, *Merito hæc dicuntur præpostera, quia in hiis præsumunt posteriora.*

(1) *Que justices de banke le roy, & del banke al Westm', &c.]* This statute being made in affirmance of common right doth extend to the court of chauncery, court of exchequer, and to all other courts of justice, for that all are within the same mischiefe, and therefore ought to be within the same remedy.

(2) *A terminer a un jour.]* Upon this act this auncient conclusion of law doth follow, *Judicis officium est opus diei in die ipsa perficere.*

Mag. Chart.
c. 29.

And this agreeth with that excellent law of *Magna Charta*, *Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum.*

C A P. XLVII.

PURVIEW est ensement, que si
ul desormes purchase brieve de
novel disseisin (1), et celuy sur que le
brieve vient, come principal disseisor
mourge avant que l'assise soit passe, que
le pl' eit son brieve dentre foun dus sur
disseisin, sur le heire, ou sur les heires
les disseisors (2), de quel age que ils
soient. En mesme le maner eit le heire,
ou les heires le * disseisee lour briefes
dentre sur les disseisors lour auncestre,
ou lour heires (3), de quel age que ils
soient. Et si paraventure le disseisee
mourge avant que il eit son purchase
fait (4), issint que pur les nonages des
heires dun part ne d'autre (5) ne soit le
* [257] brieve

IT is provided also, that if any from
henceforth purchase a writ of novel
disseisin, and he against whom the
writ was brought as principal dissei-
sor, dieth before the assise be passed,
then the plaintiff shall have his writ
of entrie upon disseisin against the
heir or heirs of the disseisor or dissei-
sors, of what age soever they be. In
the same wise the heir or heirs of the
disseisee shall have their writs of
entrie against the disseisors, or their
heirs, of what age soever they be, if
peradventure the disseisee die before
that he hath purchased his writ; so
that for the nonage of the heirs of the
one

briefe abatus, ne le plee delay (6), mes en quant que l'bon' poit sans ley offender, soit haste pur la fresh suit apres le disseisin (7). Et en mesme le maner soit en ceo point gard' en droit des prelates, gents de religion, et auters (8), as queux terres et tenements en nul maner puissent devenir apres auter mort, le quel que ils soient disseises, ou disseisours. Et si les parties en pledant descendent en enquest, et lenquest passa encounter-le heire deins age, et n'osment encounter le heire le disseisee, que il en ceo case eit lattaint (9) de la grace le roy sans rien doner.

one party, nor of the other, the writ shall not be abated, nor the plea delayed; but as much as a man can without offending the law, it must be hasted to make fresh suit after the disseisin. And in like manner this shall be observed in all points for the right of prelates, men of religion, and other to whom lands and tenements can in no wise descend after others death, whether they be disseisees or disseisours. And if the parties in pleading come to an inquest, and it passeth against the heir within age, and namely, against the heir of the disseisee, that in such case he shall have an attain of the king's special grace.

Mirror, ca. 5. § 4. (Dyer 137. 6 Rep. 4. 17 Ed. 3. 16. 12 Ed. 4. 17. 8 Ed. 3. 71. 21 Ed. 3. 27. 27 H. 6. 1. Fitz. Age, 71. 3 Bulstr. 137. Regist. 229, 230. 13 Ed. 1. stat. 1. c. 15.)

The mischief before this statute was, that if a man had been disseised, and either the disseisee, or the disseisor had died, their heir being within age, in a writ of *entre sur disseisin* brought by the heir of the disseisee being within age, or by the disseisee or his heir against the heir of the disseisor being within age, the paroll had demurred untill the full age of the heir respectively, which was a great delay, and is remedied on both parts by this act.

See the Custom. de Norm. ca. 43.

(1) *Purchase briefe de novel disseisin.*] Albeit the disseisee purchased no writ of attise of *novel disseisin*, yet the heir or heirs of the disseisor are within this statute; for seeing in this case here put by the makers of this law, true it is, that notwithstanding the purchase of the writ in a writ of *entre sur disseisin* brought by the disseisee against the heir of the disseisor, the heir should have had his age to the great delay of the demandant, this is shewed for a mischief in this particular case, to persuade that the law might be generall, though no writ was brought, as by the body of the act appeareth.

3 E. 3. age 71.
8 E. 3. 71.

(2) *Briefe de entry foundus sur disseisin, sur le heire ou heires les disseisors.*] This is to be understood of a writ of entry in the *per*, and not in the *post*, for the words of the statute be *sur le heire le disseisor*, which is a writ of entry in the *per*, and therefore if the heir of the disseisor make a feoffment in fee, and the feoffee dieth, his heir within age, in a writ of entry against the heir, he shall have his age, for this act extends but to the heir of the disseisor, who sitteth in his fathers seat, and commeth to the land without consideration; but otherwise it is of him that purchaseth the land of the heir, for he and his heirs are out of the letter and meaning of this act: the same law is of the vowchee and price in aide within age.

12 E. 4. 17.
5 E. 3. age 70.
6 E. 3. 3.
21 E. 4. 15.
27 H. 6. 1.
Dier 4 Mar. 137.

If the fem' heir of the disseisor taketh husband, and hath issue within age, and dieth, the disseisee bring a writ of entry against the tenant by the curtesie, he pray in aide of the heir within age,

17 E. 3. 61.
27 H. 6. 1.

he shall have his age, for this is a writ of entry in the *post*, being brought against the tenant by the curtesie, and so out of the statute.

24 E. 3. 25. b.
46, 47.

[258]

If there be two brothers, and a sister, the elder brother disseiseth one, and dieth, and the land descendeth to his brother, and he enters and dieth seised, and the land descendeth to the sister within age: in a writ of entry brought by the disseissee against the sister, she shall be ousted of her age by this statute: wherein three things are to be observed. First, that the mediate heire on the part of the disseisor is within this statute. 2. That though the sister is to make herself sister and heire to the younger brother, and not to the disseisor, for that her younger brother entred, yet is she heire within the meaning of this statute to the disseisor, and therefore to be ousted of her age. 3. That a writ of entry in the *per* and *cui* in this speciall case is within this act.

Speciall heires, as in gavelkinde, borough English, and the sister of the whole blood are on both sides within this statute, for though they be not heires by the common law, yet are they heires within the intention of this law, which is to be taken benignly, being made for expedition of justice, and to oust delay.

8 E. 3. 71.
10 E. 3. 58.
21 E. 3. 27.
6 E. 3. 31.

(3) *En mesme le maner eit le heire, ou les heires le disseisee leur briefes dentre sur les disseisors ou leur heires.*] This is to be understood as well of the mediate as of the immediate heire of the disseisor; and therefore if there be grandfather, father, and son, and the grandfather is disseised and dieth, and the father of full age likewise dieth, the son is within age, and brings his writ of entry against the disseisor, he is an heire within this statute, for he maketh himselfe heire to the grandfather, who was the disseisee.

(4) *Et si peraventure le disseisee murge avant que il eit son purchase fait.*] Here by expresse words provision is made, though the disseisee die before the purchase of his writ, whereof somewhat hath been said before.

(5) *Issint que pur les nonages des heires dun part ne daut, &c.*] Where the demandant or the tenant shall have his age at the common law, you may reade at large in Markals case abovesaid: it is there resolved, that the heire as well of the demandant as the tenant, should have had his age in this case.

(6) *Ne soit le briefe abatus ne le plea delay.*] Here abatement is taken for putting off the writ and plea without day untill full age, but the writ is not abated, that is, overthrown, *non cadit breve*, for so Bracton saith, *Minor ante tempus agere non potest infra ætatem, maxime in causa proprietatis, nec etiam convenire, sed differetur usque ætatem, sed non cadit breve.*

Bract. li. 5. fo.
& lib. 4. f. 218.
b.

8 E. 3. 71.
Dier 4. Mar.
ubi supra.

(7) *Pur la fresh suit apres le disseisin.*] *Statutum de W. 1. habetur intelligi, ubi hæres disseisti facit recentem sessionem, aliter non.*

24 E. 3. 25. 46,
47.
Lib. 6. fol. 4.
Markals case.
10 E. 3. 58.
6 E. 3. 11.
9 E. 2. age 141.
24 E. 3. 25. 46.

This fresh suit is not to be understood between the disseisor and the disseisee, although the disseisor continue in possession by the space of 30 or 40 yeares, &c. But when the disseisor dies, then is the fresh suit to be made, and that is regularly within a yeare and a day after the death of the disseisor, for within that time continuall claim may be made, which is in law *recens et continuum clameum*, and within that time an appeale of death may be brought, which is *recens infecutio*; and *sic in multis aliis similibus.*

(8) *En droit des prelates, gents de religion, et auters, &c.*] This clause is to be understood of ecclesiasticall persons, that be regular, and not of ecclesiasticall persons, that be secular, for the regular are

dead

dead persons in law, to whom no lands (as this statute speaketh) can descend after the death of any other: but to the secular, as to bishops, parsons, vicars, and the like lands may descend, and therefore they are not within this clause, but within the former branches of this act for such lands as they are seised of to them and their heirs in their naturall capacity.

(9) *Et lattaint.*] Of the writ of attaint, see before the statute of Marlebridge, cap. 14, and here cap. 37.

C A P. XLVIII.

[259]

S*I gardein ou chiefe seignior enseoffe*
 (1) *ul home de la terre que est del*
heritage del enfant (que est deins age
et en sa garde) a le disheritance del
heire: purview est, que le heire eyt
maintenant son recoverie per brieve de
novel disseisin vers son gardein, et vers
le tenant (2). *Et soit la seisin baille*
per justices (si el soit recover') al pro-
chein, amy lenfant, a que le heritage ne
purra my descend' (3), *pur approver al*
oeps lenfant, et a responder des issues al
heire quant il viendre a son pleine age.
Et le gardein perde a tout sa vie la
garde (4) *de mesme la chose recover',*
et tout la remainder del heritage, quel
tient en nosme del heire. Et si auter
gardein que chiefe seignior (5) *le face,*
perde le garde de tout cel chose (6) *a cel*
soits et soit en grievie peine envers le roy.
Et si lenfant soit esloigne, ou disturbe
per le gardein, ou per le feoffee, ou per
auter, per que il ne puisse sa assise suer,
sue pur luy (7) *un deses prochain amies*
(8) que voudra, et soit a ceo rescovec.
 W. 2. cap. 15.

IF a guardian, or chief lord, infeofff any man of land, that is the inheritance of a child within age, and in his ward, to the disheritance of the heir; it is provided, that the heir shall forthwith have his recovery by assise of novel disseisin against his guardian, and against the tenant; and the seisin shall be delivered by the justices (if it be recovered) to the next friend of the heir (to whom the inheritance cannot descend) for to improve to the use of the heir, and to answer for the issues unto the heir, when he shall come unto his full age; and the guardian, during his life, shall lose the custody of the thing recovered, and all the inheritance that he holdeth by reason of the heir. And if another guardian than the chief lord do it, he shall lose the wardship of all together, and be grievously punished by the king. And if the infant be carried away, or disturbed by the guardian, or by the feoffee, or by other, by reason whereof he cannot sue his assise, then may one of his next friends (that will) sue for him, which shall be thereto admitted.

(Fitz. Assise, 105. Bro. Assise, 491. 2 Ed. 3. 16. 8 Ass. pla. 22. 27 H. 3. 1. 40 Ed. 3. 16. 13 Ed. 1. stat. 1. c. 15. Rast. 366, 367.)

The mischief before this statute was, that when the gardein in chivalry made a feoffment in fee, the judges, for the saving of the warranty between the feoffor and the feoffee, and that the right of each might be saved, allowed that a writ of entry in the *per* did lye for the heir before this statute, as it appeareth by Bracton, and 15 H. 3. Bract. l. 5. fo. nay, 324. 15 E. 3.

Br. 87^o. 19 E. 2.
Aff. 4^o.
4 E. 2. Br. 790.

19 E. 2. Aff.
400. 7 E. 3. 69.
8 E. 3. 63.
8 Aff. 28. 14 E.
3. Feoffm. 67.
10 E. 4. 18.
Vid. W. 2. c. 25.

nay, the judges in ancient time did allow a writ of entry in the *per*, as it appeareth by the old Register, of a feoffment made by a baillie: but this opinion, or errour rather, was holpen by the resolution of the judges; and the alienation of the gardein (after this act) to be made is holpen by this act, by enacting and declaring, that an assise of *novel disseisin* doth lye against the gardein and his feoffee; therefore of a feoffment made by the gardein after the statute, no writ of entry in the *per* doth lye, but an assise of *novel disseisin*: and the statute hath adjudged the feoffment a *disseisin*; but of an alienation by the gardein before this statute, a writ of entry in the *per* doth lye after this act, because this act doth extend to feoffments made afterwards, as appeareth by the letter thereof; but if the tenant alien, and the gardein and his feoffee dye, or if the heir dye, so as no assise can lye by this act, then of such an alienation after this act a writ of entry doth lye: and all this is approved by the authority of our books, and upon these diversities all the books are reconciled.

This statute speaketh onely of a gardein in chivalry, therefore tenant for years, tenant by *elegit*, statute merchant, &c. shall be reserved till we come to the statute of W. 2. cap. 25.

(1) *Enfeoffe.*] The feoffment at these times was the generall assurance of the realm, but a fine is within this act, for that is a feoffment of record.

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(2) *Maintenant son recoverie per briefe de novel disseisin vers son gardein, et vers le tenant.*] Here two things are to be observed, 1. upon this word *maintenant*, that is, presently without any delay: and this is the 7. act made at this parliament for expedition of justice, and for the ousting of delayes; for as it is commonly said, the devill deviseth delayes: wherein this noble king followed the steps of that good king Alfred, in whose time the law of England was as followeth; *En son temps pouvoit chescun pl^r aver commission, ou briefe a son vise^r al seignour de fee, ou a certain justices assignes sur chescun tort; en son temps se basta droit de jour en jour, issint que ouster 15 jours n'estoit nul default, ne nul essoine adjournable.*

Mirror, cap. 5.
§ 1.

Fleta, li. 1. c. 11.
10 E. 4. 18.
W. 2. cap. 25.

2. By this act, not onely the gardein is a disseisor, but the feoffee also; and so doth Fleta render it, *Et apud Westm^r fuit provisum quod custos, qui alienat terras hæredis, habeatur pro disseistore, &c.* and soon after he saith, *Habeantur pro disseistoribus tam custos, quam emptor.*

Fleta ubi supra.

(3) *Et soit le seisin baille per justices, &c. al prochein amy del infant, a que le heritage ne purra my descend.*] This clause Fleta rendreth in this manner, *Et cum terra fuerit recuperata, tradatur propinquiori amico, cui hæreditas descendere non debeat, qui respondeat puero de exitibus, cum ad ætatem suam pervenerit.*

And where the statute saith, *Soit, &c. baille per justices*, the meaning is no more but this, that the justices before the recovery was had, shall charge the next of the kin, to whom the land cannot descend, to take according to this act the custody of the lands, and to yeeld a true account to the heir at his full age, and to enter an order of court thereof accordingly.

And he is neither a gardein in chivalry, nor in socage, but a statute gardein in lieu of the gardein in chivalry by force of this act.

And if this gardein dye before the full age of the heir, his executors shall not have the custody, but the next of kin, to whom the land

land cannot descend; for this act hath annexed it to the next of blood, to whom the land cannot descend.

(4) *Et le gardein perde a tout sa vie la garde, &c.*] This branch is to be understood of a gardein in droit, that is to say, of the chief lord, for he is not onely to lose the custody of the land aliened, and of all the residue of the heritage which he had in ward; but also to lose all benefit of wardship of that tenancie, by the letter of this law, during his life, for that against the office and duty of a gardein, he hath fought the disherison of the heir which he had in his custody: and Fleta translateth this clause in these words, *et si sit capitalis dominus qui hoc faciat, amittat custodiam tota vita sua tam de residuo, quam de terra alienata*; but in this case the lord by his feoffment of the tenancie, or any part thereof hath extinguished his seigniority for ever, whether the feoffment be made of all the tenancie, or but of part, by the common law: and these words (during his life) being in the affirmative, restraineth not the operation of the common law in this case.

Fleta, li. 1. c. 11.

Vide 1. part Instit. sect. 968.

(5) *Et si auter gardein que chiefe seignour.*] This is intended of a gardein in fait: as where the lord assigneth over the custodies to another, he is called a gardein in fait; hereof Fleta saith, *et si alius fuerit custos, quam capitalis dominus feodi illius, amittat custodiam rei recuperata, &c.*

Fleta ubi supra.

(6) *Perde le garde de tout cel chose.*] The feoffment made by the gardein in fait is a forfeiture of his estate by the common law of the whole, if the feoffment were made of the whole; and if of part, then of that part onely by the common law; but this statute giveth the forfeiture of the whole land in ward: but it seemeth in this, the wardship of the body is not lost, because this branch extendeth to the land onely; no more then upon the statute of Glouc' in case of waste done to the disherison of the heir, the statute saith, *perdra le garde*, yet shall he not lose the custody of the body: and in both these cases, the seigniority, which is the cause of the wardship, continueth; but where the seigniority is extinct, there the heir shall be out of ward, both for body and land.

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Gloc'. cap. 5.

Mich. 28 H. 8.
Benloes.

(7) *Sue pur luy un de ses prochein amies.*] Before the making of this act, the gardein or his feoffee, or some other would eschoigne or disturb the infant, so as he could not take his remedy by law, and by attorney he could not appear, therefore this act in this particular case doth give the infant to purchase and follow his writ of assise upon this act by *prochein amy*, albeit he be not present in court; and ever since the statute of Westm. 2. which is generall, the common rule is holden, that an infant shall sue by *prochein amy*, and defend by *gardein*.

See before, c. 42.
40 E. 3. 16.
W. 2. ca. 15.

(8) *Prochein amy.*] *Amicus propinquior*; in our books the names of *gardein* and *prochein amy* are sometimes taken the one for the other because the *gardein* and *prochein amy* are oftentimes all one, as the *gardien* in socage is also *prochein amy*, &c. And now as well the *gardein*, as the *prochein amy* are allowed by the judges to be some of the officers of the court, and both in respect of their place and skill are in troth the best *prochein amyes* for the good and furtherance of the infants cause.

Fleta rendreth this clause in these words, *Et si hæres impeditus fuerit ad sequendum, sequatur unus de propinquiribus amicis, et admitatur*; and this admission is by the order of the court, but the gardein must put in a warrant,

Fleta ubi supra.
40 E. 3. 16.
48 E. 3. 10.
33 E. 3. Attorney 94. 19 Aff.
In 10. 27 Aff. 53.

34 Aff. 5. 28 Aff.
2. 29 Aff. 67.
35 H. 6. 12.
29 E. 4. 2. 16 H.
7. 5. F.N.B.
27. I. 13 E. 3.
Attorney 76.

In an action of waste, brought by an infant against the abbot of R. as gardein in chivalry, *quas tenet*, the infant came not in person, but one came as *prochein amy* by the statute, which is intended by the said statute of West. 2. and prayed to be received to sue, for that the infant was effoined; against which this objection was made, that it appeared not judicially to the court that the infant was effoined, and that such a suggestion in the case of assise and mordancester had used to be made, because the effoyning, which is the cause that the statute setteth down, might be enquired of, being a jury, the first day, but otherwise it was in the case at the barre being an action of waste; but it was resolved, that the *prochein amy* ought to be admitted upon the said suggestion in this case, for that the writ is brought against the *gardein*, which peradventure had effoined the infant, and he of his own wrong shall not take advantage, and therefore the court did award that the *prochein amy* should be admitted to sue, &c. Which case I have remembered here, because it may serve for an exposition as well of this act of Westm. 1. as of the said act of Westm. 2.

C A P. XLIX.

EN brieve de dower dont dame riens nad, ne soit le brieve abatus per exception del tenant (1), pur ceo que el avera resceive son dower de auter home avant son brieve purchase, sil ne puit monstre que el eit resceive part de sa dower de luy mesme (2), et en mesme la ville (3) avant son brieve purchase (4).

IN a writ of dower called *unde nihil habet*, the writ shall not abate by the exception of the tenant, because she hath received her dower of another man before her writ purchased, unless he can shew that she hath received part of her dower of himself, and in the same town, before the writ purchased.

{Regist. 170, 171. Fitz. Voucher, 196. Fitz. Dower, 75, 76. 86. 89. 114. Kel. 128.}

[262.]
Bract. li. 4. fo.
311. b.

The mischief before this act doth notably appear by Bracton, who treating of this writ, *Unde nihil habet*, saith, *ad hoc autem quod dicit mulier in intentione sua (et unde nihil habet) si quidem partem dotis habuerit, licet minimam, si hoc dedicere non possit, vel cum hoc probatum fuerit, cadit breve, nec de residuo quod ei defuerit poterit sibi prospicere nisi per breve de recto de dote, nihil igitur recipiat de dote sua ante brevis impetrationem, ita quod breve contineat omnes desorcientes ubicunq; fuerint in uno comitatu, vel in diversis. Et cum omnes contineantur, tunc primo recipiat, et si recipiat ante iudicium, etiam sine iudicio non obstat ei exceptio, quod aliquid habuerit, quia respondere poterit, quod satisfactum est ei ante iudicium, &c. si petens dicat quod exceptio, &c. ei nocere non debet, quia nihil habet in tali villa, vel in alia tali villa, non valebit talis sua replicatio, quia id quod dicitur (unde nihil habet) non debet referri ad villas, sed ad dotem: hereby doth the mischief before this act manifestly appear.*

Fleta, li. 5. c. 25.

And Fleta rehearsing the effect of this statute, saith, *in brevi autem de dote unde mulier petens nihil habet, non cadit breve per exceptionem tenentis petentis iudicium de brevi, descut supponit eam nihil habere,*

cum

cum aliquid habeat, vel dotem suam de aliquo receperit pro parte ipsam contingente, nisi partem dotis receperit a seipso in eadem villa ante brevis impetrationem.

(1) *Per exception del tenant.*] Regularly tenant is taken for him that is tenant of the free hold, but in the case of dower, it lyeth against gardein in chivalry, because in that case he is to answer for the heir, but not against the gardein in focage. See hereafter in this chapter, where this exception shall lye in the mouth of the vouchee being tenant in law.

(2) *De luy mesme.*] First, it must be of the same tenant, and not of another, though it be in the same town; as if the husband infeoffeth A. of Whiteacre, and B. of Blackacre, both in Dale, and the wife receiveth dower of A. she notwithstanding shall have a writ of dower (*unde nihil habet*) against B. by the expresse purview of this act, for he is not the same tenant of whom she received her dower.

Secondly, if A. having a wife doth infeoffe the husband of one acre, and the wife of another, and both in Dale; A. dyeth, the husband assigneth dower of his acre, yet doth the writ of dower (*unde nihil habet*) lye against the husband and wife, for they are not the same tenant.

Thirdly, if the baron be seised of Blackacre and Whiteacre in Dale, and after the coverture maketh a lease for life of Blackacre, and granteth Whiteacre and the reversion of Blackacre to A. and his heirs, to whom attornment is made, and dyeth; the wife receiveth dower of A. of Whiteacre, and after the lessee for life dyeth, the wife shall have a writ of dower (*unde nihil habet*) to be endowed of Blackacre; for albeit it be against the same tenant, and in the same town, and before the writ purchased, which are the three points required by this act, yet is there another property necessarily implied, and that is, that he be such a tenant of both the one land and the other, at the time of the receipt of dower, as she might have had her writ of dower (*unde nihil habet*) against him, of both which she could not have in this case, in respect the lessee for life was tenant of the free-hold at that time, and so no default in her.

The baron is seised of a carue of land holden by knights service, and of Whiteacre in Dale, and after the coverture infeoffeth A. of Whiteacre with warranty, and dyeth, his heir within age, the gardein assigneth dower of the carue of land, and then the wife brings her writ of dower against A. who voucheth the heir in the custody of the gardein, the gardein pleads the receipt of dower of the said carue in the same town, and adjudged a good plea and the writ of dower (*unde nihil habet*) abated.

The same law it is, if the gardein that assigned the dower dyed, and the heir had been vouched in the guard of his executors, his executors in the case abovesaid should plead the same plea.

And so if the heire in that case had been vowched of full age, he might have pleaded as vouchee, as an assignement of dower by himselfe in the same towne.

(3) *En mesme la ville.*] A writ of dower, *unde nihil habet*, doth lie in an hamlet, but yet if the demandant have received dower out of the hamlet, and in the same town, the writ shall abate: otherwise it is, though it be in the same parish, if it be

Brit. fo. 258.
13 E. 1. Bre. 863.
8 E. 2. ibid. 809.
18 E. 2. ibid. 833.
6 E. 3. 257.
7 E. 3. 368.
8 E. 3. 384.
10 E. 3. 509.
11 E. 3. Bre. 475.
13 E. 3. ibid. 242.
16 E. 3. ibid. 657.
4 E. 3. 42.

Brit. fol. 257.
12 E. 3. Dower
89.

2 E. 2. Dower
124.
12 E. 3. Dower
86.

3 E. 3. Dower
76. 3 E. 3.
Voucher 196.
Kelw. 128.

[263]
First part of the
Inst. sect. 39.

18 E. 2. bre 829.
4 E. 3. ibid. 745.
4 E. 3. 52.
8 E. 4. 6.

be in another town, for the words of the statute be, *en mesme la ville.*

Fleta ubi supra.
 Bracton ubi
 supr. 3 E. 3.
 Vowch. 106.
 12 E. 3. Dower
 36. Regist. 171.

(4) *Avant son briefse purchase.*] Of this clause Fleta saith thus, *Si partem dotis suæ receperit post breve impetratum, quamvis ab ipso tenente, non propter hoc cadit breve mulieris, cum dicere poterit ante judicium, quod de residuo, vel omissione est ei satisfactum,* and so it appeareth by Bracton, it was, as to this point, at the common law.

C A P. L.

ET pur ceo que le roy ad fait cel chose (1) al honour de Dieu, et saint esglise, et pur le common profit de people, et pur le allegiance de ceux queux sont greves (2), il ne voit my que au-terfoits puissent turner a prejudice de luy, ne de sa corone: mes que les droits, que a luy apperteign' (3), luy soient saves en tous points.

AND forasmuch as the king hath ordained these things unto the honour of God and holy church, and for the commonwealth, and for the remedy of such as be grieved, he would not that at any other time it should turn in prejudice of himself, or of his crown; but that such right, as appertains to him, should be saved in all points.

This is a saving to the king of the rights of his crowne.

(1) *Cel chose.*] That is, that this statute of W. 1. which hath been made to foure excellent ends, *viz.* the honour of God, the honour of the church, for the commonwealth, and for the remedy, disburdening, and ease of them, that be grieved, should not be prejudicial to him, or to his crown, but that the rights, which to him appertain, should be saved.

(2) *Allegiance de ceux queux sont greves.*] This should be *alleviance de ceux, &c.* That is, disburdening, remedying, and easing of such as be grieved.

Regist. fol. 61.
 Bracton.

(3) *Mes que les droits queux a luy appertain.*] That is to say, the kings rights, or the kings rights of his crowne, or the rights of the crown, for so these, which since are called prerogatives, before this time were called *jura regia*, or *jura regia coronæ*, or *jura coronæ*; Bracton calls them *privilegia regis*, and Britton, *droit le roy.*

17 E. 2. Prærog.
 Regis. 26 E. 3.
 Quar. Imp. 95.
 18 E. 3. Scire
 fac' 10. 8 H. 4.
 2. 9 H. 4. 6. 15 E. 4. 12, 13.

But since this act *jus regni, &c.* hath been commonly called *prærogativa regis*, which is all one with this, that this act calls *droit le roy.*

See the first part of the Institutes, sect. 3. *Lex coronæ.*

CAP. LI.

ET pur ceo que graund charitie serra de faire droit a tous en tout temps (1), ou mestier serroit: purview est per assentment des prelates (2), que assises de novel disseisin, mortdauncester, et de darrein presentment (3) fuissent prises en le Advent (4), en Septuagesime (5), et en Quaresme (6), auxibien come le home prent lenquestes, et ceo pria le roy as evesques (7).

AND forasmuch as it is great charity to do right unto all men at all times (when need shall be) by the assent of all the prelates it was provided, that assises of novel disseisin, mortdauncester, and darrain presentment, should be taken in Advent, Septuagesima, and Lent, even as well as enquestes may be taken, and that at the special request of the king, made unto the bishops.

The cause of the making of this statute doth manifestly appeare by Britton, who being B. of Hereford, and expert both in the common and canon law in his chapter *De challenge de jurors*, saith thus, Britton, ca. 53.
Et s'ils yjoient assets des jurors uncore purrout ascuns estre removables per verie challenges des parties, et auxi pur le temps en case: car heures ne sont pas meures: car per canon est defendu de saint esglise sur peyne de excommengement, que de la Septuagesime jesque al utas de Pasche, ne del commencement de Advent jesque al utas de la Epifayne, ne en jours del quatre temps, ne en jours de major letanies, ne en jours de roveysouns, ne en le semaigne de Pentecost, ne en temps de scier lees, ne de vendenges que durent de la S. Margaret jesque al 15. de juint Mi-hael, ne en solemne jours de fesaints de saints, nulluy ne jurge sur le ewangelies, ne nul secular plea ne teigne, ne summons ne face en temps avandits, isint que tous cest temps soit done a Dieu prier, et de pejer contekes, et de accorder ceux, que sont a discord, et pur coiller les biens del terre, dont le peuple doit vivre.

Which in respect of some difficulty I have thought good to translate; "and if sufficient jurors appeare, some are removeable for just challenges of the parties, and also for the time in case; for all houres are not fit for all seasons: for it is forbidden by the canon of holy church upon paine of excommunication, that from the Septuagesime untill eight days after Easter, and from the beginning of Advent untill eight days after the Epiphany, (or twelfe day) or in the dayes of the foure times (that is, the ember dayes appointed for publike fasts foure times in the yere) or in the dayes of the great letanies, or in rogation or gange dayes, or in the week of Pentecost, or in time of harvest, or of vintage which dureth from the feast of S. Margaret (which is the thirteenth of July) untill 15 dayes after the feast of S. Michael the archangell, or in the solemne feasts of the acts of saints, no man be sworn upon the holy evangelists, nor any secular plea be holden in the times aforesaid, but that all these times be given for prayer to God, and to appease debate, and to accord them that be at discord, and to gather the fruits of the earth, whereof the people may live, which were works of piety and charity."

This act beginneth with a maxime of law, *Summa charitas est facere*

facere justitiam singulis in omni tempore, quando opus fuerit, and therefore provideth that the three assises, viz. of novel disseisin, mordaunc', and of darrein presentment should be taken in Advent, Septuagefme, and Quaresme.

Int' leges Edw.
regis, anno
Dom. 924.

[265]
27 H. 6. c. 5.

(1) *Tout temps.*] Here is understood *covenable in ley*, for in the common law there be *dies juridici, et dies non juridici; dies non juridici sunt dies dominici*, the lords dayes throughout the whole yeare, so called, because the Lord and Saviour of the world did arise again on that day: and this was the ancient law of England, and extended not onely to legall proceedings, but to contracts, &c. *Dacus si die dominico quicquam fuerit mercatus, re ipsa, et oris præterea duodecim mulctator, Anglus triginta solidos numerato;* and it is truly said, *reges, qui serviunt Christo, faciunt leges pro Christo.*
2. In Easter terme the day of the ascension of the Lord Jesus Christ.
3. Before the statute of 32 H. 8. Trinity terme extended into the time of harvest, and then in that terme the day of the nativity of S. John Baptist was not *dies juridicus*, but by that statute that terme is so abbreviated, as that day falls not within the same, onely *dies dominici* are not *dies juridici* in that terme. In Michaelmasse terme the day of All Saints, and the day of All Soules; and in Hilary terme, the day of the Purification of the blessed Virgin Mary, are not *dies juridici*.

Fortescue, c. 51.
fol. 66. b.

And it should seem by Fortescue, that there be also *horæ juridicæ*, for he dedicating his book to the prince saith, *Scire te etiam cupio, quod justiciarii Angliæ non sedent in curiis regis, nisi per tres horas in die, scilicet ab hora octava ante meridiem, usque horam undecimam completam, quia post meridiem curiæ ille non tenentur, sed placitantes tunc se divertunt ad pervisum, et alibi consulentes cum servientibus ad legem, et aliis consiliariis suis. Quare justiciarii postquam se refecerint, totum diem residuum pertranseunt studendo in legibus; sacram legendo scripturam, et aliter ad eorum libitum contemplando, ut vita ipsorum plus contemplativa videatur, quam activa, &c.*

Mirror, c. 5. § 1.

And the Mirror saith, *Abusio est que tient pleas per Dimenches (i. sabbath dayes) ou per auters jours descendus, ou deviant le soleil levie, ou noctantre, ou in disbonest lieu.*

(2) *Purview est per assentment des prelates.*] Which is expressed, not that the prelates assented alone, but that it was enacted by the king with the whole assent of parliament, which is implied by these words, *purview est*, and this act is entred into the parliament roll with the rest made in this parliament. But *per assent des prelates* is added to manifest that this act concerning the crossing of a canon of the church was enacted by their assents.

See the first part
of the Institutes,
sect. 524.

And here it is worthy of observation, that albeit divers judges of the realme were men of the church, as Britton, Martin de Pateshull, William de Raleighe, Robert de Lexinton, Henricus de Stanton, and many others; and that the honourable officers of the realme, as lord chancellor, lord treasurer, lord privie seale, master of the rolls, &c. were in those dayes men of the church, yet they ever had such honourable and true-hearted courage, as they suffered no inroachment by any forein power upon the rights of the crowne, or the lawes and customes of the realme, as in Cawdryes case in the fifth part of my Reports is partly shewed, and much more (if it were requisite) may be said in that behalfe.

Li. 5. fo. 1. Caw-
dries case.

Brit. ubi supra.

(3) *En assise de novel disseisin, mordauncester, et darrein presentment.*] Hereof Britton saith, *Les evesques nequident et prelates de saint esglise seunt*

font dispensations que assises, et juries sont prises en tiels temps per reasonable enchesons.

(4) *Ad-vent.] Adventus Domini in carne, et incipit die dominica proxima ante festum Sancti Andreae, vel ipsa die Sancti Andreae, si in dominica venerit;* and endeth eight dayes, after twelfe-tide, or the Epiphany. 7 aff. p. 7.
14 aff. 4.

(5) *Septuagesime.] Septuagesima* beginneth on the third Sunday before Shrovefunday, and endureth till eight dayes after Easter.

(6) *Quaresme.] Quadragesima* beginneth the first Sunday in Lent, and endureth all Lent. [266]

(7) *Et ceo pria le roy as evesques.]* Faire and good words many times further, but never hinder any good work.

How the canon above said tooke no place in other actions not named in this act (if you observe the times forbidden by the canon) is manifest by our bookes, and common experience in all ages since the making thereof.

STATUTUM DE BIGAMIS. [267]

Editum anno 4 Edw. I.

IT is called *Statutum de Bigamis* of the fift chapter of this parliament, wherein those that be *bigami*, are barred of the privilege of clergie.

IN præsentia venerabilium patrum quorundam episcoporum Angliæ, et aliorum de consilio regis, recitatæ fuerunt constitutiones subscriptæ, et postmodum coram domino rege et consilio suo auditæ et publicatæ, quia omnes de consilio, tam iusticiarii, quam alii concordaverunt (1), quod in scripturam redigerentur ad perpetuam memoriam, et quod firmiter observentur.

IN the prefence of certain reverend fathers, bishops of England, and others of the king's council, the constitutions under-written were recited, and after heard and published before the king and his council, forasmuch as all the king's council, as well justices as other, did agree that they should be put in writing for a perpetual memory, and that they should be steadfastly observed.

Here may you observe the ancient order of proceeding in parliament for passing of bills; first a select committee of certain bishops, barons, and some of the commons, with the judges assistants (who after are expressly named) expressed here under these words, *et aliorum de consilio regis* (for at this time the lords and commons sat together) and after the committee of both houses had resolved hereupon, then to report it to the whole councill here

II. INST.

X

expressed

expressed under these words [*audite et publicatæ*.] which order in the severall houses is continued to this day.

30 Aff. 5. 8 E. 2.
Dower 169.
5 E. 3. 65.
9 E. 3. 33.
10 E. 3. 26.
39 E. 3. 12, 13.
2 H. 7. 7.
4 H. 7. 1. 2.
tit. Aide le
roy 33-

Shard beholding the manner of the penning of this act, was of opinion that it was no act of parliament; but the contrary is holden by many expresse authorities both before, and after him. And these words in the first chapter [*Concord est per justiciarios et alios sapientes de consilio regni*] do prove it to be by authority of parliament, for *consilium regni*, is the lords and commons, legally called *commune consilium regni*.

(1) *Quia omnes de consilio, tam justiciarii, quam alii concordaverunt, &c.*] And because this was done by the advice of the justices, and was but a declaration of the common law concerning *aide prier* of the king, and warranties, as by the words of the act it appeareth, therefore they are inserted into the act with this addition, *Qui consuetudines et usum judiciorum hactenus habuerint*; and 'sir Ralph de Hengham was chiefe justice of the kings bench, and sir Thomas de Weyland chiefe justice of the court of common pleas at this parliament.

[268]

CAP. I.

DE placitis ubi tenens excipit, quod sine rege respondere non possit: concordatum est per justiciarios, et alios sapientes de consilio regni domini regis (1), qui consuetudines et usum judiciorum hactenus habuerunt (2), quod ubi feoffamentum factum fuerit per regem, et charta super hoc confecta, tantum se habeat, quod si alia persona per consimile feoffamentum et consimilem chartam teneretur ad warrantiam, justiciarii ulterius procedere non potuerunt (3); nec hucusque processerunt, nisi super hoc præceptum à rege habuerint (4), nec videre possunt quod procedere possint.

CONCERNING pleas where the tenant excepteth, that he cannot answer without the king; it is agreed by the justices, and other learned men of our lord the king's council of the realm, which heretofore have had the use and practice of judgement, that where a feoffment was made by the king with a deed thereupon, that if another person by a like feoffment and like deed be bounden to warranty, the justices could not heretofore have proceeded any further, neither yet do proceed without the king's commandment had therefore, neither can it be thought that they may proceed.

(2 H. 7. 11. 5 H. 7. 16. 9 H. 7. 15. 15 H. 7. 10. Fitz. Procd. 5, 6. Fitz. Travers. 41. 1 Roll 233.)

(1) *Per justiciarios, et alios sapientes de consilio regni domini regis.*] Here was used the ancient forms of parliaments, when the acts were *Rex ex consilio sapientum, &c.*

Inter leges Inz,
an. Dom. 727.

At a parliament holden by king Inas, anno domini 727. the statutes began thus, *Ego Inas Dei beneficio rex suasu et instituto Cenredi patris mei, Hedde et Erkenwaldi episcoporum meorum, omnium senatorum meorum, et nativorum sapientum populi mei in magna servorum Dei frequentia, &c.* Here is the parliament expressed, as it continueth to this day.

Has

Has ego Aluredus rex sanctiones in unum collegi, &c. multa tamen quæ nobis minus commoda videbantur ex consulo partim antiquanda, partim innovanda curavi.

Inter leges Aluredi regis, anno dom. 900.

And again, *Hæc sunt senatus consulta ac instituta, &c. quæ à sapientibus recitata sæpius, atque ad communem regni utilitatem amplificata sunt.*

Decreta atque sunt hæc omnia in celebri Grantaleano concilio, cui Walsunus interfuit archiepiscopus, et cum eo optimates et sapientes ab Æthelstano evocati frequentissimi; this is that Grandcestier in Cambridge-shire, of which the poet said,

Inter leges Æthelstani, anno dom. 940.

*Olim Granta fuit multis urbs inclita rebus,
Nunc etenim magnum nil nisi nomen habet.*

And that great parliament which Etheldred held, is called *sapientum consilium*: and more of this kinde might be remembered.

Inter leges Etheldredi, anno dom. 1016.

(2) *Qui consuetudines et usum judiciorum hæcenus habuerunt.*] For of ancient, and at this time many of the nobility and of the clergy were expert in the laws and customs of the realm, and had judicial places, as partly hereby, and more at large may appear in the first part of the Institutes.

See the first part of the Institutes, sect. 534.

(3) *Tantum se habeat, quod si alia persona per consimile feoffamentum et consimilem chartam teneretur ad warrantiam, jussit ulterius procedere non potuerunt.*] By this branch, if the king give lands with clause of an expresse warranty, yet the patentee, &c. shall not have or recover in value against the king, without special words that the king shall yeeld lands in value upon eviction, &c. and neverthelesse, in that case he shall have aid of the king by the generall purview of this law, for it is for the honour of the king, that he aid the patentee with any records or evidence that he hath for maintenance of the estate which he hath granted and warranted to him. ^a But if the king exchange lands with another by this warranty in law, the king is bound to warranty, and to yeeld in value, and so it was adjudged, Hil. 6 E. 1. in communi banco Rot. 2. William Brewses case, Wallia.

3 H. 6. 56. sic adjudicatur tempore E. 1.

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^b If the king give lands to one in fee, by this word *dedi*, this bindeth not the king to warranty, and yet the patentee shall have aid of the king by the letter of this branch, because in that case another person should be bound to warranty by this word *dedi*: and so it is, albeit the tenure by the patent is to hold of the chief lords.

^a 17 E. 3. 12.
H. 6 E. 1. Rot. 2.
in banc Wallia.
^b 8 E. 3. 10. 18
E. 3. tit. Aide.
31 & 142.
2 H. 7. 7. &
15 H. 7. 10.
^c 28 Aff. 19. 39.
28 E. 3. 94. b.
24 E. 3. 34. b.
26 E. 3. 58.
31 Aff. 2. 7 E. 3.
7. 39 E. 3. 12.
7 H. 4. 43.
11 H. 4. 86.
13 H. 4. 14.
4 H. 6. 29.
7 H. 6. 36.
8 H. 6. 25.
11 H. 6. 12.
8 H. 7. 9. 11.
^d Lib. 5. fo. 106.

^c If it appear to the court, that the letters patents, or other causes of *aid prier* be void, against law, or insufficient in law, no aid shall be granted, for the law will not suffer those things to be aided or maintained by the countenance of law, which appear to the court to be void, against law, or insufficient; *ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa et legitima.*

^d And according to former authorities of law, so was it adjudged 43 Eliz. in Foxleys case, and that *aid prier* ought not to be used for delay of justice, see notable and ancient records; and where *feoffamentum* and *charta* mentioned in this chapter must be taken for lawfull feoffments and charters, as in other cases.

^e And as it hath been said in the case of *aid prier*, so it holdeth in all points, in the case when the tenant or defendant prayeth not in aid, but a writ *de domino rege inconsulto* is brought and directed to the judges; if it appear to the court, that the cause is

not

X 2

Tr. 11 E. 3. Co-
ram rege Rot.
101. South.
21 E. 3. 24. 44.
22 E. 3. 6.
25 E. 3. 48.
2 R. 3. 13. tit.
Aide le roy 33.
9 H. 7. 15. 4 H.
7. 1. F.N.B.
153. f. & 154.
d. e. Regist. 220.
221. 227. lib. 9.
fol. 16. Anna
Bedingf. case.
f. Lib. 9. fo. 16.
Anna Bedingf.
case. 10 E. 3. 61.
22 Aff. p. 5.
E Regist. 220.
&c. F.N.B. 153.
&c. 26 E. 3. 58.
12 H. 4. 18.
11 H. 4. 72.
13 H. 4. 3.
9 H. 6. 40.
12 H. 6. Proc. 9.
Dierl. Mar. 101.
4 Eli. 209.
9 Eliz. 256. 15 Eliz. 320.

not available or sufficient in law, the court ought to disallow the writ, and to proceed in the cause; and if the cause appear to the court to be just and lawfull (as in our books it appeareth to be, and not brought for delay) then the judges ought to surcease, &c. and so it was resolved, Mich. 34 & 35 Eliz. in *communi banco*, between Giles Blofeld pl^r in *ejectione firmæ* of the demise of Reignold earl of Kent plaintife, and Thomas Havers farmor of the earl of Arundell defendant, of the mannour of Winfarthinge in Suffolk.

† Upon the *aide prier*, or writ, the award is *quod tenens sive defendens sequatur penes dominum regem*, and the tenant or defendant ought to remove the record into the chancery, and in case of the *aide prier* the plea is not put without day.

(4) *Nisi super hoc præceptum à rege habuerint.*] This *præceptum* is by the kings writ of *procedendo*, whereof there be two sorts, *viz. in loquela et ad iudicium*; for the kings commandments in judiciall proceedings are ever by writ, according to the course of the common law, whereof you may read in the 2 Register, F. N. B. and our books; and which writs the king, *ex merito justiciæ*, in due time ought to grant; for the king himself by the great charter is presumed in law to sit in court, and to say *Nulli vendemus, nulli negabimus, vel differemus justiciam, vel rectum*; but if a title doth appear for the king to the possession, then no *procedendo* shall be granted.

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CAP. II.

IN *certis autem casibus, utpote ubi rex confirmaverit, vel ratificaverit (1) factum alicujus in rem alienam, vel rem aliquam alicui concesserit, quantum in ipso est (2), vel ubi charta profertur, quod rex tenement^o aliquod reddiderit, nec clausula aliqua in ea contineatur, per quam warrantizare debeat (3), et in consimilibus casibus, non erit supersedendum occasione confirmationis, ratificationis, concessionis, seu redditionis, aut aliorum consimilium, quin postquam hoc regi fuerit ostensum, sine dilatione procedatur (4).*

AND it seemeth also, that they could not proceed in certain cases, as where the king hath confirmed or ratified any man's deed to the use of another, or hath granted any thing as much as in him is, or where a deed is shewed, and clause contained therein, whereby he ought to warrantize: and in like cases they shall not surcease by occasion of a confirmation; grant, or surrender, or other like, but, after advertisement made thereof to the king, they shall proceed without delay.

(Rast. 27.)

30 Aff. p. 5.
8 E. 3. 33.
39 E. 3. 12.
35 H. 6. 56.
9 H. 6. 50, &c.

(1) *Ubi rex confirmaverit, vel ratificaverit.*] Here be three cases where aid, &c. ought not to be granted of the king, nor the court surcease by force of a writ *de domino rege inconsulto*: whereof the first is, when the king confirms or ratifies, &c. which must so be understood, when the confirmation giveth no estate, and if it giveth any estate, where no rent or service is reserved, or where in like case

case (as hath been said) another person were not bound to warranty; but if a rent or service be reserved, and by the action brought (if the demandant prevail) the rent or service should be defeated, then there is good cause of *aide prier*, &c. or if a common person were in that case bound to warranty, then is the confirmation in nature of a feoffment, and within the first chapter: what hath been said in case of confirmation, the same holdeth in case of release.

(2) *Alicui concesserit, quantum in ipso est.*] Here is the second case where no aide ought to be granted, for the king granteth but his own estate without any warranty.

(3) *Quod rex tenementum aliquod reddiderit, nec clausula aliqua in ea contineatur, per quam warrantizare debeat, &c.*] This is the third case where no aide shall be granted, in case of a restitution.

(4) *Postquam hoc regi fuerit ostensum, sine dilatione procedatur.*] Here some have supposed, that in these three cases aide should be granted, but by force of these words, that no search should be granted, wherein two errors be committed: 1. That aide should be granted, which is against the expresse letter of the statute, *non erit supersedendum, &c.* and against the book of 39 E. 3. *ubi supra*. 2. That in case of *aide prier* of the king, or of the writ *de domino rege inconsulto*, no search ought to be granted, but onely in a petition of right.

2 H. 7. 7, 8.
39 E. 3. 12, 13.

14 E. 3. ca. 14.
9 E. 4. 32. Dier.
15 Eliz. 320.

And if aid had been in any of these three cases erroneously granted, the tenant or defendant should have a *procedendo sine dilatione*, that is, without delay, and of course, which is the sense of these words.

CAP. III.

[271]

DE dotibus mulierum ubi aliqui custodes hereditat' maritorum suorum custodias habent ex dono vel concessione regis, sive custodes rem petitam teneant, sive hæredes dictorum tenementorum vocentur ad warrant', si excipiant, quod sine rege respondere non possunt, non ideo supersedeatur, quin in loquela prædict', prout justum fuerit, procedatur.

CONCERNING the endowment of women, where the guardians of their husbands inheritance have wardship by the gift or grant of the king, or where such guardians be tenants of the thing in demand; or if the heirs of such lands be vouched to warranty, if they say that they cannot answer without the king: they shall not surcease upon the matter therefore, but shall proceed therein according to right.

(Fitz. Aid de Roi, 11, 12, 17. 30. 34. 37, &c.)

This statute having not been put in print untill towards the latter part of the reign of H. 8. and thereby, as it seemeth, not commonly known; there have divers aide prayers been granted directly against both the points of the purview of this statute, as well when the writ of dower hath been brought against the kings

X 3

grantee

8 E. 3. 15. 18 E.
3. 38. 19 E. 3.
aide le Roy 64.
39 E. 3. 8.
46 E. 3. 19.
13 R. 2. bre.
646. 11 H. 4.
39. 5 H. 5. 13.
F.N.B. 154. d.

4 H. 7. 1, 2.
8 E. 2.
Dower 169.
Li. 9 fo. 15, 16.
Anna Beding-
fields case.
Ad Parliam.
tent' post festum
S. Hil. 18 E. 1.
fo. 6.

grauntec or committee, as where the heire came in as vowchee in his custody; and the like rule Brian gave in 4 H. 7. but when justice Townesend remembred him of this statute of Bigamis, the aide was over ruled.

And at the parliament holden in 18 E. 1. an act is in the parliament roll thus entred, *Quod viduæ recipiant dotem de terris in custodia regis existentibus, dominus rex præcepit justiciariis de banco, quod viduæ post mortem virorum suorum petant dotem suam, &c. et quod in placitis illis procedant secundum communem legem regni, et quod partibus faciant debitum justiciæ complementum.*

So as seeing the letter of this chapter of 4 E. 1. extends but where the king hath graunted the custody over, or where the heire came in as vowchee, this act of 18 E. 1. made about fourteen yeares after, addeth, that these widowes shall recover dower against the heire in the custody of the king, where the king graunteth not the custody to any, but keepeth the lands in his owne hands. And I am verily perswaded, that seeing the graunting of aide, where no aide was grautable, was not any error (whereby the judgement might be reversed) some judges either for that cause, or for feare, have graunted aide of the king in many cases, where it was not to be graunted by law, and the rather, for that in ancient times aides of the king were little or no delay at all; for writs of *procedendo* were speedily graunted, whereas of later times aides prayers; and specially writs *de domino rege inconsulto* are used merely for delay of justice, and that for no small time.

C A P. IV.

DE *purpresturis* (1), seu *occupationibus* (2) quibuscunque factis super regem, sive in libertatibus, sive alibi (3). Concordatum est quod tempore regis H. diffinitum erat et concordat, quod ubi occupatores superstites fuerint (4), rex de plano resumat * (5) sibi rem taliter occupatam de manibus occupantium, quod etiam de cætero in regno observetur. Et si aliquis de hujusmodi resumptionibus conqueratur (6), prout justum fuerit, audiat.

* [272]

CONCERNING *purprestures*, or any manner of usurpations, made upon the king within franchises, or elsewhere, it was agreed and determined in the time of king Henry, that where such usurpers were living, the king should reise of new the land so usurped out of the hands of the usurpers; the which thing also shall be from henceforth observed in the realm; and if any do complain upon such re-seisers, he shall be heard like as right requireth.

17 E. 2. cap. 13. (9 Rep. 16. Fitz. Dower, 169. 17 Ed. 2. c. 13.)

This act is but a confirmation of a former statute made in the reign of king H. 3.

(1) *De purpresturis*.] *Purprestura* commeth of the French word *purprise*, or *pourpris*, which signifieth an inclosure or building, and in legall understanding signifieth an incroachment upon the king, either upon part of the kings demesne lands of his crown, which are

are accounted in law as *res publicæ*, et *semper favorabile fuit in omni republica principis patrimonium*; or in the high-ways, or in common rivers, or in the common streets of a city, or generally when any common nufans is done to the king and his people, endeavouring to make that private, which ought to be publique, which Glanvill very aptly describeth in these words, *Dicitur autem purprestura, vel porprestura proprie, quando aliquid super dominum regem injuste occupatur, ut in dominicis regis, vel in viis publicis obstructi, vel in aquis publicis transuersis à recto cursu, vel quando aliquis in civitate super regiam plateam aliquid ædificando occupaverit, et generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regie viæ, vel civitatis.*

Glanv. li. 9. cap. 11.

It was an article of the eyre before this act to enquire *De purpresturis factis super dominum regem, sive in terra, sive in mari, sive in aqua dulci, sive infra libertatem, sive extra.*

Cap. Itineris.

It appeareth also by Glanvill, that there be also purprestures done to subjects, but this chapter treateth onely of purprestures done to the king and his people.

(2) *Seu occupationibus.*] Here *occupationes* are taken for usurpations upon the king, and it is properly, when one usurpeth upon the king by using of liberties and franchises, which he ought not to have: and as an unjust entry upon the king into lands or tenements is called an intrusion, so an unlawfull using of franchises or liberties is said an usurpation, but *occupationes* in a large sense are taken for purprestures, intrusions, and usurpations.

(3) *Seu in libertatibus, sive alibi.*] That is to say, within liberties, or places that have franchises, or privileges, or without.

(4) *Ubi occupatores surperstites fuerint.*] This was a law of great equity, for it extended not but to the wrong doers themselves.

(5) *Rex de plano resumat.*] That is, may clearly reseise. But this is to be intended upon due conviction, for so saith Glanvill, *Et qui per juratam ipsam aliquam hujusmodi fecisse purpresturam convictus fuerit, in misericordia domini regis remaneat, &c. et quod occupavit, reddet.*

Glanv. ubi sup. pra.

(6) *Et si aliquis de hujusm' resumptionibus conqueratur, &c.*] And yet such reseisures shall not be finall, but the party grieved may complaine of such reseisures, *Et prout justum fuerit, audiat.*

CAP. V.

[273]

DE bigamis (1) quos dominus papa in concilio suo Lugdunensi (2) omni privilegio clericali privavit, per constitutionem inde editam, et unde quidam prælati (3) illos qui effecti fuerant bigami ante prædictam constitutionem, quando de feloniam reitati fuerunt, tanquam clericos exegerunt sibi liberandos: concordatum est et declaratum coram rege et concilio suo, quod constitutio illa intelli-

CONCERNING men twice married, called *bigami*, whom the bishop of Rome, by a constitution made at the council of Lions, hath excluded from all clerks privilege, whereupon certain prelates (when such persons have been attainted for felons) have prayed for to have them delivered as clerks, which were made *bigami* before the same constitution; it is

X 4

agree

intelligenda sit (4), quod siue effecti fuerint bigami ante prædictam constitutionem, siue post, de cætero non liberentur prælatis, immo fiat eis justitia sicut de laicis.

agreed and declared before the king and his council, that the same constitution shall be understood in this wise, that whether they were *bigami* before the same constitution, or after, they shall not from henceforth be delivered to the prelates, but justice shall be executed upon them, as upon other lay people.

(Altered by 1 Ed. 6. c. 12. Raft. 106. 1 Jac. 1. c. 11.)

Mirror, ca. 3.
de except. de
Clergy.
Britton, fo. 11. b.
Fleta, li. 1. c. 32.
11 H. 4. 10.
18 E. 3. ca. 3.
2 E. 6. c. 12.
Stam. Pl. Co.
135.
Per decret. Epi-
scol' Gregor. 9.
lib. 6. decretal. a
Bonifacio 8. in
Lugdunensi
conc' edit.
Britton, fo. 225.
Fleta, li. 1. c. 32.
Flect. l. 4. fo.
247.

Regist.
18 E. 3. 21.
38 E. 3. 2.
27 E. 3. 8.
5 E. 3. 26.
11 H. 4. 80.
13 E. 4. 3.
Doct. et Stud.
116. F.N.B. 38.
f. & 35. a.
See W. 2. ca. 5.
verbo semestre.

(1) *De bigamis.*] *Bigamus* is he that either hath married two or more wives, or that hath married a widow, as it appeareth in the statutes of 18 E. 3. cap. 2. 1 E. 6. cap. 12.

(2) *Concilium Lugdunense, &c.*] The constitution here mentioned is in these words, *Altercationis antiquæ dubium præsentis declarationis oraculo decedentes bigamos omni privilegio clericali declaramus esse nudatos, et coercionis fori secularis addictos, consuetudine contraria non obstante; ipsi quoque anathemate prohibemus deferre tonsuram, vel habuum clericalem.*

This constitution is hereafter in this chapter explained.

This councill was holden at the city of Lyons in France, Bonifacius the eight being pope.

At the councill of Lyons, Britton and Fleta say, at Lateran faith Bracton, the pope endeavoured to take away the presentations from princes and lay patrons to present by laps, for that the constitution saith, *Quod collatio beneficii est res spiritualis, et aliter credentes essent hæretici, &c.* and the common law saith, that a presentation to a benefice is temporall, and so it is declared by divers acts of parliament.

At this councill after fixe moneths the diocesan shall present: the Register saith, that to present by laps was *diocesanis specialiter indultum* after fixe months, and yet if after the fixe moneths the patron present before the diocesan collate, he ought to receive his clerk, notwithstanding the generall councill.

But when the kings turn came to present *jure coronæ* by laps, the Register saith, *Nullum tempus occurrit regi ex consuetudine hætenus obtent' in regno Angliæ*, so as the councill did not binde the right of the king, nor could the diocesan present by laps untill it was *ei indultum*; that is, untill it was allowed to him by consent of the realme with such limitations and restrictions, and with binding him in many cases to give notice, as was thought just and reasonable in subjects cases, for the better service of God and instruction of the people. But the king, who is *supremus dominus*, loseth not his presentation by any laps at all, the said constitution notwithstanding.

(3) *Unde quidam prælati, &c.*] Certain prelates did interpret the said generall councill to extend onely to such as became *bigami* after the councill, and they challenged such clerks, as were *bigami* before that councill, when they were arraigned for felony, and required to have delivery of them.

But hath the parliament power in these cases to make declarations? yea, and in greater, for by authority of parliament it was declared,

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See Art. Cler.
cap. 15.
2 R. 2. cap. 6.

declared, that Urban the twelfth was duly elected, and ought to be accepted pope; the truth is, that the cardinals forsook Urban, and accepted Clement the seventh, therefore it was enacted that all benefices and possessions of cardinals rebels within England should be seized, &c.

This schisme between these two popes continued 39 years, till the councell of Constance, one cursing and warring with another, in so much, that by reason of this schisme, above 200,000 Christians were miserably slain, this Urban drowned, five cardinals slew the bishop of Aquitane, gave authority to Spencer bishop of Norwich against Clement the anti-pope.

Theorike
Crentz.

(4) *Concordatum est et declaratum coram rege et concilio suo quod constitutio illa intelligenda sit.*] Here the king by advise and counsell of his high court of parliament doth expound and explain this constitution made at the said generall councell, and declareth where clergy should be taken away in respect of bigamy.

And this interpretation of the parliament was against the practise of the prelates, as before it appeareth, and contrary to the custome before used, as by the constitution it self appeareth.

But the true cause of this declaration by act of parliament was, that seeing the judges of the common law were judges of allowance or disallowance of clergy to him that was arraigned of felony, and that the said constitution tooke away the priviledge of clergy, and by consequent the life of man, the judges, before they allowed of the said constitution, would have it declared by authority of parliament.

12 E. 3. Cor.
117. 34 H. 6.
42. 9 E. 4. 29.
22 E. 4. Coron.
44. 15 H. 7. 9.

This law to deprive men that were *bigami* of the priviledge of their clergy was complained of in parliament, in 51 E. 3. and by king E. 6. in the first year of his raigne wholly abrogated and taken away.

Rot. Parl. 51 E.
3. nu. 63. 1 E.
6. c. 12.

It fell out at this councell of Lyons mentioned in our act (as our histories report) that the popes wardrobe in that city (wherein was that detestable charter which king John made to the pope to bring the crown of England in servage to the see of Rome) then was wholly consumed with fire; a divine and fiery revocation of that most unjust and forcelesse charter, as was unanimously resolved both in parliament and elsewhere.

William Thorn,
Thomas Sprotte,
&c.

Rot. Parl. anno
40 E. 3. nu. 8.
Rot. claus.
3 E. 1. memb. 9.
in schedula.

C A P. VI.

IN chartis autem ubi continentur (*dedi et concessi tale tenementum sine homagio* (1), *vel sine clausula quæ continet warrantiam, et tenend' de donatoribus et hæredibus suis* (2) *per certum servitium*) *concordat' est per eosdem justiciar' (3), quod donatores et hæredes sui teneantur ad warrantiam. Ubi autem continentur (dedi et concessi, &c.) tenendum de capitalibus dominis feodi, aut*

IN deeds also where is contained *dedi et concessi tale tenementum* without homage, or without a clause that containeth warranty, and to be holden of the givers, and their heirs, by a certain service; it is agreed, that the givers, and their heirs, shall be bounded to warranty. And where is contained *dedi et concessi, &c.* to be holden of the chief lords of the fee, or of

aut de aliis, quam de feoffatoribus, vel hæredibus suis, nullo servitio sibi contento, sine homagio *, vel sine dicta clausula warrantiæ, hæredes sui non teneantur ad warrantiam. Ipse tamen feoffator in vita sua (4) ratione doni proprii tenetur warrantizare (5). Prædictæ autem constitutiones editæ fuerunt apud Westmonasterium in parlamento post festum Sancti Michaelis, anno regni regis E. filii regis H. quarto, et extunc locum habeant.

of other, and not of feoffors, or of their heirs, reserving no service, without homage, or without the foresaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor during his own life, by force of his own gift, shall be bound to warrant. All these constitutions afore said were made at Westminster, in the parliament next after the feast of St. Michael, the fourth year of the reign of king Edward, son of king Henry; and from that time forth they shall take effect.

(Dyer 15, 221. 1 Rep. 1. 1. 3 Rep. 58. 4 Rep. 81. 5 Rep. 17. 8 Rep. 51.)

There be two branches of this act, and two consequents thereupon, the first branch is, that where *dedi* is contained in a deed (albeit there be no other warranty) to hold of the donor and his heirs (as at the making of this act, viz. in 4 E. 1. a man might have done) there the feoffor and his heirs had been bound to warranty, and this was the common law; for where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty for the feoffor and his heirs to the feoffee and his heirs; and herewith agreeth Glanvill, *Tenantur autem hæredes donatorum donationes et res donatas sicut rationabiliter factæ sunt, illis quibus factæ sunt, et hæredibus suis warrantizare.*

Glanv. l. 7. c. 2.

Bracton, lib. 5. fol. 388. b.

And Bracton herewith agreeth saying, *Et sciendum est quod ad omnes chartas de simplici donatione competit tenenti warrantizatio, et tenentur donatores et eorum hæredes ad warrantiam, si hora congrua, et modo debito cum prosecutione competenti vocati fuer' ad warrantiam, nisi forte in charta de feoffamento contrarium exprimitur.* And in those dayes regularly the donee did hold of the donor, unless there were a speciall limitation to the contrary. And when the feoffment was made by this word [*dedi*] to hold of the donor and his heirs, then he and his heirs are bound to warranty.

31 E. 1. Vowcher 290.

20 E. 3. Count. de garr. 7.

31 E. 3. Vow. 286. Li. 4. 81. Nokes case.

The consequent is, that although there be an expresse warranty contained in the deed, yet that taketh not away the warranty that is wrought by force of *dedi*, but the feoffee may take advantage either of the one, or the other at his pleasure.

Britton, fo. 88. b.

The second branch is, that where *dedi* is contained in the deed, to hold of the chiefe lord, and not of the feoffor, there, although there were no other warranty in the deed, the feoffor shall be bound to warranty during life. Britton saith, *Si le purchasor soit del done challenge in sa seisin, si ert le donor tenu de garranter auter son done tant come il vivra, tout ne soit a ceo oblige per especialtie de escript tout face le purchasor de ceo homage a auter que al donor, si come al chiefe Seignour.*

31 E. 1. Vowcher 290.

6 E. 2. Vowch. 258. 29 E. 3. 20. 2 H. 7. 7.

If the gift be made to hold of the chiefe lord of the fee, then *dedi* bindes none to warranty, but him that made the gift.

And it is to be known that since the statute of *quia emptores*, 18 E. 1. the feoffee in fee simple doth hold of the chiefe lord, and therefore

therefore at this day in that case the feoffor is onely bound to warranty during his life; but if a man at this day give lands in taile by the word *dedi*, the donor and his heires are bound to warranty; and so it is of a lease for life, reserving a rent, though it be without deed.

The consequent herèupon is, that albeit there be in this case of the second branch an expresse warranty, the feoffee may take advantage of the one or the other, as upon the first branch hath been said. See for this Nokes case abovesaid.

(1) *Sine homagio.*] The law was generally holden in those dayes, that homage being parcell of the tenure reserved to the feoffor and his heires, imported a warranty to the feoffee and his heires, and so much is implied by these words in this act, *sine homagio*, that is, without any warranty by reason of homage, but that was ever intended, so long as the tenancy continued * by descent in blood of the first purchaser, for if the tenement were transferred out of his blood by feoffment, or any other translation, in that case the tenant should vouch his feoffor or his heirs, if he had any warranty, but not in respect of the homage: and that this was the ancient law, appeareth by Glanville, who saith, *Si aliquis alicui donaverit aliquod tenementum pro servitio et homagio suo, quod postea alius versus eum dirationaverit, tenebitur quidem dominus tenementum id ei warrantizare, vel competens excambium ei reddere. Secus est tamen de eo, qui de alio tenet feodum suum sicut hæreditatem suam, et unde fecerit homagium, quia licet is terram illam amittat, non tenebitur dominus ad excambium*; and this is signified in the doing of homage, *Homagium si dominus recipere voluerit, tunc in signum warrantie acquietationis et defensionis manus tenentis infra manus suas tenere debet, dum tenens profert verba homagii*. And this day it holdeth in case of homage auncestrell.

(2) *De donatoribus et hæredibus suis.*] So it is if a body politique or incorporate had by deed, wherein *dedi* was contained, infeoffed another to hold of him and his successors, this had created a like warranty, as in this act is mentioned.

(3) *Concordatum est per eosdem justiciarios.*] That is (as hath been said before) enacted according to the advice, and resolution of the justices.

(4) *Ipse tamen feoffator in vita sua.*] The letter of this act extends but to the feoffor upon a feoffment made, but if *dedi* doth enure by way of release or confirmation, it importeth a warranty during the life of him that makes the deed; so it is if a reversion expectant upon an estate for yeers, life, or in tail be granted by this word *dedi*, and attornment had, here *dedi* doth import a warranty, though the state passeth not by way of feoffment; so it is of a rent, of an advowson, or the like.

Bracton saith, *Si vero charta fuerit de confirmatione, non sequitur inde warrantizatio, nisi in se contineat donationem; ut si dicatur, do, et confirmo tali et hæredibus suis, &c.* If a man by *dedi* letteth land for life, by this the lessee shall vouch the lessor (though the reversion be granted away) and yet the lessor is not properly feoffator.

(5) *Ratione doni proprii tenetur warrantizare.*] Albeit in two places before in this act *dedi et concessi* are coupled together, yet these words *ratione doni proprii* do appropriate the warranty to *dedi* onely;

6 H. 7. 2.
20 E. 3. Count;
de garr. 7.
6 E. 3. 11. 22
Aff. 52. 18 E. 3.
8. 14 H. 6. 25.
6 H. 7. 2. 10 H. 7.
F. N. B. 134. h.
5 Eliz. Dier 121.
Nokes case,
ubi supra.
Bract. l. 5. f. 389.
Fleta, li. 6. c. 23.
Britton, fo. 170.
The first part of
the Institutes,
cap. Homage
Auncest. sect.
143.

* [276]

Glanv. li. 9. c. 4.
14 H. 6. 25.

Vide the first
part of the In-
stitutes ubi sup.
31 E. 1. Voucher
290.

Bract. ubi supra.
48 E. 3. 2. a.
14 H. 6. 25.

11 H. 6. 41.
11 H. 4. 41.
14 H. 6. 25.
6 H. 7. 2. F.
13. 4. h.

only; and agreeable to this expoſition in our books is the common and conſtant opinion of learned men at this day.

39 E. 3. 26.

11 H. 7. 13.

Two jointenants make a feoffment in fee by this word *dedi*, the one dyes, the ſurvivour ſhall be vouched, and render in value for the whole; for though the ſtate paſſed from both, and the ſtatute ſaith, *ratione doni proprii*, yet each of them did warrant the whole by this word *dedi*, otherwiſe the ſurvivour ought not to have yeelded the whole in value, as it hath been adjudged; and the reaſon is, for that the heir of the jointenant that dieth cannot be bound by the warranty created by this word *dedi*.

But if two jointenants make a feoffment in fee, with an expreſſe warranty for them and their heirs to the feoffee and his heirs, and the one of them dye, the ſurvivour ſhall not be vouched alone, but the heir alſo of the other, and the recompence in value ſhall lye equally upon them; but if the one of them have nothing, the other ſhall answer the whole; for it is a maxime in law, *Quando de una et eadem re duo onerabiles exiſtunt, unus pro inſufficientia alterius de integro onerabitur*. But in the ſaid caſe of *dedi*, the ſurvivour was only chargeable with the warranty.

[277]

STATUTUM de GLOCESTER.

Editum Anno 6 Edw. I.

THIS parliament was holden at Gloceſter bordering upon Wales, for the better preſervation of peace in Wales, Lluellin prince of Wales, and the Welſh-men being a little before this parliament brought to quietneſſe.

LAN du grace M. CC. lxxvii. (1) et del raigne le roy Ed. ſits le roy Henry, vi. a Glouceſtre le moys Dauguſt, purview antemeſme le roy, pur amandement de ſon roialme, et pur plus pleiner exhibition de droit (2) ſicome le profit doffice demaunde, appellees les plus diſcrectes de ſon roialme, auxibien des greinders come des meinders. Eſtablie eſt et concordantment ordaine, que come meſme le roialme en pluſours divers caſes, auxibien des franchises, come dauters choſes, en les quels ley avant fallit, et a eſchever les treſgreves damages, et les nient numerables diſheriſons, les quels icel maner default de ley fiſt a la gent du roialme, eit meſtier de divers ſuppletions de ley, et de novels purveiances: les eſtatutes, ordeinments, et purveiances ſuis eſcriptes de tout la gent de la roialme deſormes ſoient fermement gardes, come prelates, countees, barons, et auters del roialme clament daver divers franchises, et les quels examiner et judger, le roy a meſmes les prelates, countees, barons, et auters, avoit done jour. Purview eſt, et concordantment grante, que les avantdits prelates, countees, barons, et auters cel maner de franchise uſent, iſſint que rien ne lour accreſer per uſurpation, ou occupation, ne rien ſur le roy occupient, jeſque al prochein venue ceo roy per le countie, ou a le prochein venue des juſtices errants, as common ples en meſme le countie, ou jeſques le roy commande
auter

auter chose : save le droit le roy come il en voudra parler, solongue ceo que il eit contenue en le brieve le roy. Et de ceo soient maundes briefes as viscontes, bailifes, ou auters pur chescun demandant. Et soit la forme del brieve change,* solong; la diversite des franchises, les quels chescun clame daver. Et les viscontes per tous lour baillies ferront communement cryer, cestascavoire, en cities, burghes, et villes merchandes, et aylors, que tous ceux que ascuns franchises claiment aver per les charters les predecessors le roy, royes Dengleterre, ou en auter maner, soient devant le roy, ou devant justices en eire a certaine jour et lieu, a monstrier quel maner de franchises ils claimant daver, et per quel garrant. Et les viscontes mesmes donques serront illong; personnelment, ou lour bailifes et ministers a certifier le roy sur les avantdits franchises, et auters choses que celles franchises touchent. Et cest crie destre devant le roy conteigne garnisement dee iij. semaines. Et in mesme le maner ferront les viscontes crier en oyer de justices. Et in mesme le maner ferront ils personnelment, ou lour bailifes, et lour ministers, a certifier les justices de tiel maner de franchises, et des auters choses que celles franchises touchent. Et cest crie conteigne garnisement de quarante jours, sicome le common summons contient : issint que si la partie, que clame daver franchises, soit devant le roy, ne soit paz mis en defaut devant les justices en eyre, pur ceo que le roy de sa grace especiall ad grant, que il gardera la partie de damage quant a cel ajornement. Et si cel party soit impled sur tiels maners de franchises devant un payer de justices avantdits, mesmes les justices devant les queux la partie est en plee, garderent le partie de damage devant auters justices, et devant le roy luy mesme, mesq; il sache per les justices, que le partie fuit en plee devant eux, sicome il est avantdit. Et si ceux que tiels franchises claiment aver, ne veignent paz al jour avantdit, donques soient les franchises en nosme de distresse prises en la maine le roy per le viscont del lieu, issint quils tiel maner de franchises ne usent, jesques ils veigne a recevoir droit. Et quant ils veignent per cel distres, lour franchises eux soient replevies sils les demand, les quels replevies respoignent maintenant in la forme avantdit. Et peradventure les parties exceptent, quils ne debuient nient de ceo respondre sans brieve original, donques sil puisse estre sure que eux de lour proper fait, eient usurpe ou occupy ascuns franchises sur le roy, ou sur ses predecessors, dit lour soit que maintenant respoignent sans brieve, et puis resceivent judgement, sicome le court le roy agardera. Et sils dient [279] ouster, que lour ancesier, ou lour ancesters de mesmes les franchises morront seises, soient oyes, et maintenant soit le verity enquisse, et solongue ceo aillent les avant en le besoigne. Et sil soit trove que lour ancesters ent morust seise : donques eit le roy brieve original de sa chancery en forme fait de ceo. Le roy mande salute au viscount : summones per bone summonours un tiel, que il soit devant nous a tiel lieu en nostre prochain venue en cel countie, ou devant nous justices a primer assises, come ils en celles parties veindront, a monstrier per quel grant il clame daver quittance de torn^r pur soy ou pur ses homes per tout nostre roialme per continuation apres la mort tiel jadis son predecessor. Et eiets les summonours et ceo brieve. Et si les parties veignent al jour, respoignent, et soit reply et judge. Et sils ne veignent, ne soy eshinent devant le roy, et si le roy demurra ouster en cel county, soit commande au viscount que il le face vener al quart jour. A quel jour sils ne veignent, et le roy demurr^r ouster en cel county, soit fait sicome en eyre de justices. Et si le roy depart del countie, soient les parties ajornes a brieve jour, et eint reasonables delaies, juxte les discretions des justices, sicome en actions personal. Et les justices en eyre facent de ceo en lour oyers solongue lordeinment avantdit, et solongue ceo que tiel maner de pleges debuient estre deduct. En eyre de pleints faits et affaires des bailifes le roy, et dauters bailifes, soit fait solongue lordeinment

deinment avant fait de ceo, et ſolouque les enqueſts de ceo avant priſes, et de ceſ
ferront les juſtices en eyre ſolouque ceo que le roy lour ad enjoynt, et ſolouque les articles
que le roy lour ad liuere. Vide tout ceo in Latin pluís plaine 30 E. 1. leſtat'
de Quo warranto, tit. Franchiſes 5.

[The ſaid ſtatute of Quo Warranto, being neceſſary to the intelligence of our
author's commentary, is here ſubjoined.]

ANNO Domini M.CC.LXXVIII.
regni autem domini regis E. ſexto,
apud Gloceſt. menſe Auguſti, provi-
dente ipſo domino rege, ad regni ſui
Angliæ meliorationem, et exhibitionem
juſtice pleniorẽ, prout regaliſ officii
expoſcit utilitas, convocatiſ diſcretio-
ribus ejuſdem regni, tam ex majoribus
quam minoribus, ſtatutum eſt, concor-
datum et ordinatum, quod cum regnum
Angliæ in diverſiſ caſibus, tam ſuper
libertatibus, quam in aliis in quibus
prius lex deficiebat, ad evitand' in-
collorum damna graviffima, et exhere-
dationes innumerabiles, quæ hujusmodi
legum defectus induxerat, diverſiſ le-
gum ſuppletionibus, et novis quibuſdam
proviſionibus indigeat, proviſiones, or-
dinationes, et ſtatuta ſubſcripta ab om-
nibus regni ſui incolis de cetero fir-
miter ac inviolabiliter obſerventur.
Cum prelati, comites, barones, et
alii de regno noſtro diverſas libertates
habere clamant, ad quas examinand'
et judicand' rex hujusmodi prelatiſ,
com', baron', et aliis diem præfixerat,
proviſ. eſt, et concorditer conſeſſum
(4), quod diei prelati, com', baron',
et alii, hujusmodi libertatibus utan-
tur (3) in forma brevis ſubſcripti (5):

THE year of our Lord M.CC.
LXXVIII. the ſixth year of
the reign of king Edward, at Glou-
ceſter, in the month of Auguſt, the
king himſelf providing for the wealth
of his realm, and the more full mi-
niſtration of juſtice, as to the office
of a king belongeth (the more diſ-
creet men of the realm, as well of
high as of low degree, being called
thither) it is provided and ordained,
That whereas the realm of England
in divers caſes, as well upon liberties
as otherwiſe, wherein the law failed,
to avoid the grievous dammages and
innumerable diſheriſons that the de-
fault of the law did bring in, had
need of divers helps of new laws,
and certain new proviſions, theſe
proviſions, ſtatutes, and ordinances
underwritten ſhall from henceforth
be ſtraitly and inviolably obſerved of
all the inhabitants of his realm. And
whereas prelates, earls, barons, and
other of our realm, that claim to
have divers liberties, which to ex-
amine and judge, the king hath præ-
fixed a day to ſuch prelates, earls,
barons, and other; it is provided
and likewiſe agreed, that the ſaid pre-
lates, earls, barons, and other ſhall
uſe ſuch manner of liberties, after the
form of the writ here following:

Rex vic' ſalutem. Cum nuper in parlamento noſtro apud Weſtmonaſte-
rium (6), per nos et conſilium noſtrum proviſum ſit et proclamatum (7),
quod prelati, comites, barones, et alii de regno noſtro, qui diverſas libertates
per chartas progenitorum noſtrorum regum Angliæ habere clamant, ad quas
examinandas et judicandas diem præfixerimus in eodem parlamento, libertatibus
illis taliter uterentur, quod nihil ſibi per uſurpationem ſeu occupationem ac-
creſcerent, nec aliquid ſuper nos occuparent, tibi precipimus, quod omnes illos de
comitatu tuo libertatibus ſuis quibus hucusque rationabiliter uſi ſunt (8) uti et
gaudere

gaudere permittas in forma prædicta, usque ad proximum adventum nostrum per comitatum prædictum, vel usque ad proximum adventum justiciariorum itinerantium (9) ad omnia placita in comitatu, vel donec aliud inde præceperimus: salvo semper jure nostro cum inde loqui voluerimus. *Teste, &c.*

Eodem modo et in eadem forma dirigantur breviam vic' et aliis ballivis pro quolibet petente, et mutetur forma secundum diversitatem libertatis, qua quis habere clamant, sic:

In like manner and in the same form writs shall be directed to sheriffs and other bailiffs for every demandant, and the form shall be changed after the diversity of the liberty which any man claimeth to have, in this wise:

Rex vic' salutem. Præcipimus tibi, quod per totam ballivam tuam, videlicet, tam in civitatibus, quam in burgis, et aliis villis mercatoriis, et alibi, publice proclamari facias, quod omnes illi qui aliquas libertates per chartas progenitorum nostrorum regum Angliæ, vel alio modo, habere clamant, sint coram justiciariis nostris ad primam assisam, ad ostendendum cujusmodi libertates habere clamant, et quo warranto, et tu ipse sis ibidem personaliter una cum ballivis et ministris tuis, ad certificandum ipsos justiciarios nostros super his et aliis negociis illud tangentibus.

Ista clausula de libertatibus que sic incipit. Præcipimus tibi, quod publice proclamari fac', &c. ponitur in brevi de communi summ' itin' justic', et habeat premunitionem quadraginta dierum (10) sicut communis summonitio habet: ita quod si pars aliqua, q. clamant habere libertatem, fuerit coram rege, non ponatur in default coram aliquibus justiciariis in suis itineribus, eo quod rex de gratia sua speciali concessit conservare partem illam indemnem, quo ad illam ordinationem. Et si pars illa sit in placito super hujusmodi libertatibus coram domino pari justic' predictorum, iidem justic', coram quibus pars illa sit in placito, conservabunt eam indemnem coram aliis justiciariis, et rex etiam coram ipso, dum tamen constiterit per justiciarios quod sic fuerit in placito coram ipsis, sicut prædictum est. Et si pars prædicta fuerit coram rege, ita quod ad diem coram justic' predictis in itineribus suis esse non possit, rex hujusmodi partem indemnem conservabit coram justiciariis predictis in itineribus suis ad diem illum quo fuerit coram rege. Et si ad diem illum non venerit,

This clause of liberties, that beginneth in this wise, *Præcipimus tibi, quod publice proclamari facias, &c.* is put in the writ of common summons of the justices in eyre, and shall have a premonition by the space of forty days, as the common summons hath; so that if any party that claimeth to have a liberty, be before the king, he shall not be in default before any justices in their circuits; for the king of his special grace hath granted, that he will save that party harmless as concerning that ordinance. And if the same party be impleaded upon such manner of liberties before one or two of the foresaid justices, the same justices, before whom the party is impleaded, shall save him harmless before the other justices; and so shall the king also before him, when it shall appear by the justices, that so it was in plea before them as is aforesaid. And if the foresaid party be afore the king, so that he cannot be the same day afore the said justices in their circuits, the king shall save that party harmless before

nerit, tunc libertates ille nomine districtionis capiantur in manum domini regis per vic' loci: ita quod eis non utantur, donec venerint coram iusticiariis respons. Et cum per districtionem venerint, replegiuntur libertates sue, si eas petent: quibus replegiatis statim respondeant ad formam brevis predicti. Et si forte exceperint, quod non tenentur sine brevi originali inde respondere (11) tunc si quoquo modo constare possit, quod ipsi de facto suo proprio aliquas libertates usurpaverint, vel occupaverint super regem, vel predecessores suos, dicatur eis quod statim respondeant sine brevi, et ulterius recipiant iudicium, prout curia domini regis consideraverit. Et si ulterius dicant, quod antecessores sui inde obierint seisciti, statim audiantur, et statim veritas inquiratur (12), et secundum hoc ad iudicium procedatur. Et si constiterit quod antecessores sui inde obierint seisciti, tunc habeat rex brevi originale de cancellaria sub hac forma:

Rex vic' salutem. Sum' per bonos summonitores talem, quod sit coram nobis apud talem locum in proximo adventu nostro in comitatum predictum vel coram iusticiariis nostris ad primam assisam, cum in partes illas venerint, ostensurus quo warranto tenet visum francipleg' in manerio suo de N. vel sic, quo warranto tenet hundredum de S. in comitatu predicto; vel, quo warranto clamat habere tholonium pro se et hæredibus suis per totum regnum nostrum; et habeas ibi hoc breve. Teste, &c.

Et si ad diem illum venerint, respondeant replicetur et triplicetur. Et si non venerint, nec esson' fuerint coram rege, et rex ulterius moretur in comitatu illo, precipiatur vic', quod faciat eos venire ad quartum diem.

before the foresaid justices in their circuits for the day, whereas he was before the king. And if he do not come in at the same day, then those liberties shall be taken into the king's hands in name of distress, by the sheriff of the place, so that they shall not use them until they come to answer before the justices; and when they do come in by distress, their liberties shall be replevied (if they demand them) in the which replevins they shall answer immediately after the form of the writ aforesaid; and if percase they will challenge, and say that they are not bounden to answer thereunto without an original writ, then if it may appear by any mean, that they have usurped or occupied any liberties upon the king, or his predecessors, of their own head or presumption, they shall be commanded to answer incontinent without writ, and moreover they shall have such judgement as the court of our lord the king will award; and if they will say further, that their ancestors died seised thereof, they shall be heard, and the truth shall be inquired incontinent, and according to that judgement shall be given; and if it appear that their ancestors died seised thereof, then the king shall award an original out of the chancery in this form:

And if they come in at the same day, they shall answer, and replication and rejoinder shall be made; and if they do not come, nor be effoined before the king, and the king do tarry longer in the same shire, the sheriff

diem. Quo die si non venerint, et rex in com' illo extiterit, fiat sicut in itiner' justic' (13). Et si rex a com' illo recesserit, adjornentur ad bres dies, et habeant dilaciones competentes, juxta discretionem justic', sicut in actionibus personalibus. Etiam justic' itinerantes in itineribus suis faciant secundum ordinationem predictam, et secundum quod hujusmodi placita deduci debent in itineribus suis. De querimoniis factis et faciend' de ballivis regis et aliorum, fiat secundum ordinationem prius inde factam (14) et secundum inquisitiones prius inde captas: et ponatur clausula subscripta in brevi de communi summi itiner' justic' ad communia placita directo vic', &c. quod tale est:

sheriff shall be commanded to cause them to appear the fourth day; at which day if they come not, and the king be in the same shire, such order shall be taken as in the circuit of justices; and if the king depart from the same shire, they shall be adjourned unto short days, and shall have reasonable delays according to the discretion of the justices, as it is used in personal actions. Also the justices in eyre in their circuits shall do according to the foresaid ordinance, and according as such manner of pleas ought to be ordered in the circuit. Concerning complaints made and to be made of the king's bailiffs, and of other, it shall be done according to the ordinance made before thereupon, and according to the inquests taken thereupon heretofore; and the clause subscribed shall be put in a writ of common summons in the circuit of the justices assigned to common pleas directed to the sheriff, &c. and that shall be such:

Rex vic' salutem. Præcipimus tibi, quod publice proclamari facias, quod omnes conquerentes, seu conqueri volentes, tam de ministris et aliis ballivis nostris quibuscunque, quam de ministris et ballivis aliorum quorumcunque, et aliis, veniant coram justiciariis nostris ad primam assisam, ad quasunque querimonias suas ibidem ostendendas, et competentes emendas, inde recipiendas secundum legem et consuetudinem regni nostri, et juxta ordinationem nostram per nos inde factam, et juxta tenorem statutorum nostrorum, et juxta articulos eisdem justiciariis nostris inde traditos (15), prout predicti justiciarii tibi scire faciant ex parte nostra. Teste meipso, &c. decimo die Decembris, anno regni nostri xxx.

(1) *L'an du grace, 1267.*] This should be 1278. for that was Vet. Mag. Chart. fol. 130.
 anno 6 E. 1. this parliament being holden in August, anno 6 E. 1.
 for 1267. was in 51 H. 3.

This chapter concerning liberties and franchises, and the *quo warranto* (and intituled *Statutum de quo warranto*) hath been supposed by many to be enacted in Latin, anno 30 E. 1. and therefore some have omitted to insert it in the 6. yeare; but it is utterly mistaken: for the king in the 30. yeare did publish and proclaim this act under the great seale, and doth recite it to be made anno Dom. 1278. and in the 6. yeare of his raigne. *Vide* 14 E. 1. *Inter original' de anno* 14 E. 1. *Breve de libertatibus allocandis*, and there is another statute made in 18 E. 1. called *Statutum de quo warranto novum*, so called, in respect of this former statute.

Lib. 9 fol. 28.
 In the case of
 Strata Marcella.

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II. INST.

Y

And

And besides, the statute in French differeth from the recitall thereof in 30 E. 1. which, for that it agreeth with the record, we will follow it when we come to the body of the act.

(2) *Pur amendement de son realme, & plus plenier exhibition de droit.*] Which by the said proclamation in 30 E. 1. is rendered thus, *Ad regni sui Angliæ meliorationem, et exhibitionem justiciæ plenior*: two excellent ends of a parliament, *regni melioratio*, that is for the common good of the kingdome, the parliament being *commune concilium*, and *exhibitio justiciæ plenior*, for nothing is more glorious, and necessary, then full execution of justice.

Pol. Virgil.

And it is added, *Prout regalis officii exposcit utilitas*; and accordingly at this parliament many profitable and just laws were made, as one speaking of this parliament saith truly, *In quo quedam de regni statu decreta sunt, quæ nunc ut jura, et æquitate plena maxime usurpantur.* And that I may speak once for all, it is worthy of observation that the statutes made in this noble kings time are so agreeable to common right and equity, as few or none of them have been abrogated, but being founded upon these two pillars (the amendment of the kingdome, and the due execution of justice) remaine and continue as just and constant laws to this day.

Vide Vet. Magna
Charta, fo. 130.
Stat. de Quo
Warranto.
Pol. Virgil.

(3) *Hujusmodi libertatibus utantur, &c.*] For the better understanding of this act it shall be necessary out of history to shew the cause of the making hereof.

The truth is, that the king wanting money, there were some *innovatores* in those dayes, that perswaded the king, that few or none of the nobility, clergy, or commonalty, that had franchises of the graunts of the kings predecessors, had right to them for that they had no charter to shew for the same, for that in troth most of their charters either by length of time, or injury of wars and insurrections, or by casualty were either consumed, or lost: whereupon (as commonly new inventions have new wayes) it was openly proclaimed, that every man, that held those liberties, or other possessions by graunt from any of the kings progenitors, should before certain selected persons thereunto appointed shew, *quo jure, quoque nomine illi retinerent, &c.* whereupon many that had long continued in quiet possession, were taken into the kings hands, *Eo quod nulla tabella constarent*: Hereof the story saith, *Visum est omnibus editum ejusmodi post homines natos longe acerbissimum: qui fremitus hominum? quam irati animi? quanto in odio princeps esse repente cepit?*

Mag. Charta.
cap. 1. 9. 38.

The good king understanding hereof, and finding himselfe abused by ill counsell, and considering the statute of Magna Charta, at the parliament holden in the end of his fourth yeare by proclamation, and at the petition of the lords and of the commons now at this parliament, by authority of parliament provideth remedy, as hereafter you shall heare: this is fully agreed upon in all our histories, onely the time in some of them (as oftentimes in other cases it falleth out) is mistaken, which by this act shall be rectified according to true chronologie.

(4) *Provisum est et concorditer concessum.*] It was rightly said *concorditer concessum*, for that the said innovation was like to have beene a cause of great discord between the king and the better sort of his subjects.

(5) *Quod*

(5) *Quod dicti prelati, comites, barones, et alii hujusmodi libertatibus utantur in forma brevis ſubſcripti.*] This * forme of a writ is more ſatisſactory, then any other forme is, and this was the aun-
cient uſe.

(6) *Cum nuper in parlamento noſtro apud Weſtm'.*] That is, in the laſt parliament holden after Michaelmas, towards the end of the fourth yeare of his raigne, and therefore the great grievances aboveſaid muſt be before that parliament, for the cure was after the diſeaſe, and the remedy after the grievance.

(7) *Proviſum ſit et proclamatum.*] But this was never (that I can finde) recorded: now by this act it is provided that a writ ſhall be graunted.

(8) *Quibus bucuſque rationabiliter uſi ſunt.*] See the Register 162, 163. *De libertatibus allocandis, & F. N. B. 229, 230.*

(9) *Uſque ad adventum noſtrum per comitatum prædictum, vel uſque proximum adventum juſticiarierum itinerantium, &c.]* 'That is, untill the court of kings bench came thither, or the next coming of the juſtices in eyre: ſo all men ſhould quietly enjoy their franchiſes, which they had reaſonably uſed, untill the court of kings bench, or untill the juſtices in eyre came into that county: here it is to be obſerved, that this good king and his counsell in parliament referred the party.grieved to a legall proceeding, which implieth, that a contrary courſe was holden before. But you will demand, What remedy was this for him, that could not produce his charter, to be left to the law? I anſwer, that this was a full and perfect remedy according to juſtice and right; for the better apprehenſion whereof theſe diſtinctions are to be obſerved: Firſt, theſe franchiſes intended by this act be of two ſorts, the one may be claimed by uſage and preſcription, as wreck of the ſea, waife, ſtray, faires, markets, and the like, which are gained by uſage, and may become due without matter of record: and felons goods, outlawes goods; and the like, which grow not due but by matter of record, and therefore cannot be claimed by uſage in *paiis*, but by charter: and yet all theſe at the firſt were derived from the crowne.

Secondly, *Judicis officium eſt, ut res, ita tempora rerum quærere;* all theſe were graunted either before the time of memory, or after the time of memory: if before the time of memory, then for the former ſort, ſuch as might be claimed by preſcription, the party grievied might preſcribe, and by law he ought to be relieved. And for ſuch as lay in point of charter graunted before time of memory, the party grievied had two remedies, either by allowance, or confirmation; by allowance in the kings bench, or before the juſtices in eyre, and in ſome caſe before the juſtices of the court of common pleas, and in the exchequer; or by confirmation of the king under the great ſeale: and theſe were ſufficient for him without ſhewing the charter, and the equity of the law herein was notable, for that no charter before time of memory was pleadable by law.

If thoſe franchiſes either of the one ſort or other were graunted within memory, yet if the ſame had been allowed, as is aforeſaid, the ſame might alſo be claimed by force of the charter and allowance, without ſhewing the charter, becauſe it had been adjudged and allowed of record. And it is to be knowne that all franchiſes, which any man had either by preſcription or by charter, ought to

8 E. 3. 18.
17 E. 3. 11.
26 Aff. 24. 30
Aff. 31. 34 Aff.
14. 38 Aff. 1.
1 H. 4. 3. 12 H.
4. 23. 8 H. 6. 8.
2 E. 4. 22. 7 H.
6. 33. 9 H. 7. 12.
10 H. 7. 14. 16
H. 7. 16. 20 H.
7. 7. Kelwey
189, 190. 8 H. 8.

18 H. 6. pre-
ſcript. 45. 2 E.
3. 29. 8 H. 8.
Kelwey 189.
Stat. de 18 E. 1.
De quo warranto
novum. Lib. 9.
fo. 29. in caſe de
Straſ' Marcella.

be claimed before justices in eyre, or else for non-claim the same might bee lost, as hereafter shall bee said: so as the remedy provided by this act was plenary and perfect to give reliefe to them that right had.

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34 Aff. pl. 14.
40 Aff. 21.
6 E. 3. 54. 55.
7 E. 3. 40. 41.
18 E. 3. Co-
nuf. 39. 12 H. 4.
12. 14 H. 6. 12.
33 H. 6. 22.
35 H. 6. 54.
9 H. 7. 11.
10 H. 6. 13.
16 H. 7. 9.
* Regist. 158.
5 E. 3. 50. 51.
6 E. 3. 18.
20 H. 6. 34.
34 H. 6. 36.
Dier, 8 El. 245.
* 3 E. 6. c. 4.
13 El. ca. 6.
lib. 5. fo. 52. 53.
Pages case.

Braft. li. 1. fo. 5.
& 171. 6 E. 3.
50. 22 E. 3. 3.
24 E. 3. 1. 23.
43 E. 3. 22.
11 H. 4. 86.
9 H. 6. 58.
* Magna Charta.
cap. 29.
25 E. 3. cap. 4.
Stat. 5. 28 E. 3.
ca. 3. 42 E. 3.
ca. 3.
Stat. de 18 E. 1.
de quo war. nov.
6 E. 35. 8 E. 3.
10. 11. 16 E. 4.
6. 3 H. 7. 15.
Stanf. Prac-
rog. 74.
Pasch. 9 E. 1.
Coram rege
Rot. 17.
Suffex.

2 E. 3. 29.
6 E. 3. 5.
15 E. 4. 6, 7.

To this for the time may be added, that ancient charters, whether they be before time of memory, or after, ought to be construed, as the law was taken when the charter was made, and according to ancient allowance. * Now what the time of memory is, see the first part of the Institutes, sect. 170.

* But now by the statutes of 3 E. 6. and 13 Eliz. there is further remedy given: for albeit the charters or letter patents be lost, yet the exemplification or *constat* of the roll may be shewed forth, &c. And when any claimed before the justices in eyre any franchises by an ancient charter, though it had expresse words for the franchises claimed; or if the words were generall, and a continual possession pleaded of the franchises claimed, or if the claim was by old and obscure words, and the party in pleading, expounding them to the court, and averring continuall possession according to that exposition; the entry was ever *Inquiratur super possessionem et usum, &c.* which I have observed in divers records of those eyres, agreeable to that old rule, *Optimus interpres rerum usus.*

(10) *Habeant præmunitionem per 40. dies.*] This was by writ of the common summons of the eyre, by the space of 40 dayes before the sitting of the justices in eyre.

Now leaving all that is evident, and needeth no exposition, let us come to the next that is worthy of observation.

(11) *Et si forte exceperint quod non tenentur sine brevi originali respondere.*] Here is an ancient maxime in the law implied, that regularly no man ought to answer for his freehold, franchises, or other thing without originall writ *secundum legem terræ*; and that the * statutes to that end provided are but declarations of the ancient common law, as here it is to be seen in case of franchises in the kings own case.

(12) *Et si ulterius dicunt quod antecessores sui inde obierint seifisti, statim audiantur, et statim veritas inquiratur, &c.*] By this it appeareth that a descent of franchises doth put the king to his writ of *quo warranto*, which writ is here expressed; and note that the *quo warranto* is in nature of the kings writ of right for franchises and liberties, wherein judgement finall shall be given either against the king for the point adjudged, or for the king; and the *salvo jure* for the king serveth for any other title then that which was adjudged; and therefore William de Penbrugge the kings attorney, for prosecuting of a *quo warranto* against the abbot of Fitchamp for franchises within the manour of Steynings *sine præcepto*, was committed to the gaole.

(13) *Et si non venerint, &c. præcipiatur vicecom' quod faciat eos venire, &c. quo die si non venerint, &c. fiat sicut in itinere justiciariorum.*] If before the justice in eyre the party came not, the franchise should be seised into the kings hands *nomine districtionis*, which the party in the same eyre might replevy; but if he did not replevy them while the eyre sate in that county, the franchises were lost and forfeited for ever.

Therefore if the party now upon the *venire facias* (which this act doth give) come not while the eyre sit in that county, the franchises be lost for ever.

And ſo it is in the kings bench, if the party come not in upon the *venire facias* during that term, and replevy his franchiſes, they be loſt for ever. And therefore we concurre not with that chiefe juſtice that ſaid, that non-claim of liberties before juſtices in eyre loſt the liberties, for that (ſaith he) was but of the kings grace to grant a replevy of them, and not of right; for this opinion is againſt the authority of our books, and the continuall practice before the juſtices in eyre.

Pl. Com. 372. in
le Signior Zou-
ches caſe.

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See the ſtatutes of 18 E. 1. *De quo warranto novum*, and *De tallagio non concedendo*.

(14) *De querimoniis factis et faciendis de ballivis regis et aliorum fiat ſecundum ordinationem prius inde factam.*] That is, according to the articles of the juſtices in eyre called *capitula itineris* collected and authoriſed amongſt other things, as here it appeareth, by ordinance of parliament, and entred into the parliament roll, which you may ſee in old Magna Charta, fol. 150, 151, &c.

(15) *Juxta articulos eiſdem juſticis noſtris tradit.*] The French ſaith, *Solouque les articles que le roy leur ad liwre*. Theſe articles were delivered by the king to the juſtices in eyre to be enquired of, heard, and determined by them through all the counties of England, which afterwards were encreaſed, as by the ſame may appear.

C A P. I.

COME avant ces heures damages ne fueront agardes en aſſiſes de novel diſſeiſin forſque tantſolement vers les diſſeiſors: purview eſt, que ſi les diſſeiſors alient les tenements (1), & neient dont les damages puiſſent eſtre levies (2), que ceux a que maines ceux tenements deviendront, ſoient charges des dammages, iſſint que cheſcun reſpoign' de ſon temps (3). Purview eſt enſement, que le diſſeiſee recover' damages en brieſe dentre ſoundue ſur diſſeiſin, vers celui que eſt trouve tenant apres le diſſeiſor (4). Purview eſt enſement, que la ou avant ces heures damages ne fueront agardes en plee de mortdaunceſtor (6), forſque en caſe (5) ou tenements fueront recoveres devers chieſes ſeigniors (7) [ceci fuiſt per ſtatut' Marlbr. cap. 16.] que deſormes damages ſoient agardes en tous caſes (8), ou home recover per aſſiſe de mortdaunceſtor, ſicome eſt avantdit en aſſiſe de novel diſſeiſin. Et in meſme le

WHEREAS heretofore damages were not awarded in aſſiſes of novel diſſeiſin, but only againſt the diſſeiſors: it is provided, that if the diſſeiſors do aliené the lands, and have not whereof there may be damages levied, that they to whoſe hand ſuch tenements ſhall come, ſhall be charged with the damages, ſo that every one ſhall answer for his time. It is provided alſo, that the diſſeiſee ſhall recover damages in a writ of entry, upon novel diſſeiſin againſt him that is found tenant after the diſſeiſor. It is provided alſo, that where before this time damages were not awarded in a plea of mortdaunceſtor (but in caſe where the land was recovered againſt the chief lord) that from henceforth damages ſhall be awarded in all caſes where a man recovereth by aſſiſe of mortdaunceſtor, as before is ſaid in aſſiſe of novel diſſeiſin: and likewise damages ſhall be recovered

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le maner recover' home damages en briefe de cosinage, ayel, & besayel (9). Et la ou avant ces heures damages ne fueront taxes, forsque a le value des issues de la terre: purview est, que le demandant puit recover vers le tenant les costages de son briefe purchase (11), ensemblement ovesque les damages (12) avantdits (10.) Et tout ceo soit tenu en tous cases, ou home recover damages (13). Et soit desormes chescun tenu a render damages, la ou home recover vers luy de sa intrusion demesne, ou de son fait demesne (14).

in writs of cosinage, aiel, and besaiel. And whereas before time damages were not taxed, but to the value of the issues of the land; it is provided, that the demandant may recover against the tenant the costs of his writ purchased, together with the damages abovesaid. And this act shall hold place in all cases where the party is to recover damages. And every person from henceforth shall be compelled to render damages, where the land is recovered against him upon his own intrusion, or his own act.

(Fitz. Damage, 14. 43. 66. 68. 82. 95. 101. 102. 104. 108. 110. 127. 123. 127. 129. Hob. 95. Godbolt, 112. 1. Inst. 10. 116. Dyer, f. 370. Fitz. damage, 6. 19. 97.)

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See the first part of the Institutes, 685. 37 H. 6. 35.

Before this statute no damages were recovered in assise of novel disseisin (which then was *frequens et festinum remedium*) but onely against the disseisor, and not against the tenant that came to the lands or tenements after the disseisin, for no damages could be recovered by the common law, but against the wrong doer by him, to whom the wrong was done.

Now the mischief was, that many times the disseisor was insufficient, and not able to satisfy the damages, and by that means the disseisee recovered damages in shew against the disseisor (who was the wrong doer to him) but had not the effect thereof; now this branch doth remedy this mischief, as by the same it appeareth.

(1) *Alienont les tenements.*] The letter of this law extendeth onely to them, that came in by title, as by feoffment, or fine after the disseisin; but by equity it extendeth to them, that came in by wrong, and to them also, whose estate was before the disseisin; for example, if the disseisor were disseised, the second disseisor is within this statute, for if he that comes in by title shall be within the remedy of this law, *à fortiori*, he that comes in by wrong; and so it is of all others, that come in under the disseisor, though it be not by alienation.

14 H. 7. 28. per Wood.

10 Aff. p. 3.
10 E. 3. 24.

Also if the lord distraineth for his rent, and a stranger without the privy of the tenant maketh rescous, the stranger is onely the disseisor, and though the tenant claim not under him, but his estate is before, &c. yet in assise against the disseisor and the tenant, if the disseisor be found insufficient, the plaintife by force of this statute shall recover damages against them both.

22 Aff. 28.

And yet in some cases the tenant that claimeth under the disseisor shall not for the insufficiencie of the disseisor be answerable to yeeld damages by this statute; as if the disseisor of lands holden in *capite* alien the same to another, the alienee dyeth, his heir within age, upon office found the king committeth the custody to A. who taketh the whole profits, the disseisor is insufficient, the heir within age is no tenant within this statute, for that he never did,

nor

nor could take any profit: but if the disseisor alien to an infant, who taketh the profits, he is a tenant within this statute; or if the infant coming in as heir had been out of ward, and had taken the profits, he had been a tenant within this statute.

If the disseisor infeoffe the villein of the disseisee and a stranger, ^{43 E. 3. 17.} and the disseisor is insufficient, in this case either the disseisee must lose his damages, or infranchise his villein.

No lessee for yeers, or tenant by statute staple, or merchant, or the like, that have but a chattell, shall be accounted a mean occupier within this statute, but he that hath the inheritance or freehold at the least; otherwise he is not said to be a tenant of the land; and so much is implied in this word alien, which cannot be intended of a lessee for yeers, &c. where he, that bringeth the assise, hath right to the inheritance or freehold: but where tenant by statute merchant, or staple, &c. brings an assise, there lessee for yeers, or tenant by statute merchant, &c. may be a mean occupier, because the plaintife in the assise hath right but to a chattell.

(2) *Et nient dont les damages poient estre levies.*] Hereupon do follow three conclusions in law: 1. That if the disseisor be sufficient to yeeld the whole damages, he is solely to be charged therewith; for then this statute extendeth not to the tenant; and, as it appeareth by the preamble, he was not answerable by the common law.

The 2. conclusion is, that for the insufficiencie of the disseisor the tenant shall answer the damages by this act.

The 3. conclusion is, that if the disseisor be able to yeeld part, and not the whole damages, both shall be charged, and therefore judgement is ever given as well against the disseisor (though he be found insufficient) as against the tenant generally.

(3) *Cbescum respondra pur son temps.*] The ground hereof is, *Quod bonæ fidei possessor in id tantum, quod ad se pervenerit, tenetur.*

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Hereupon seven conclusions are grounded:

16 E. 3. Damages, 82.

1. Albeit the mean occupiers are neither disseisors nor tenants, yet unlesse they be named in the assise, no judgement can be given against them, neither can they be charged for the time they take the profit.

2. Though they be named, yet, as hath been said, the disseisor must be found by the assise to be insufficient, and the mean occupiers must be found to take the profits; for if they be omitted, and none but the disseisor and tenant named, and the disseisor is found insufficient, and no further enquired of, the tenant shall be charged for the whole.

3. If the assise be brought against the disseisor and the tenant, and it is found by the assise, that the disseisor is insufficient, and that the disseisor infeoffed A. who infeoffed B. who infeoffed the tenant, and that A. had it one yeer, and B. half a yeer, and the tenant two yeers; upon this speciall finding, the tenant shall answer damages but for his time, for *cbescum respondra pur son temps*, and the plaintife hath lost his damages against A. and B. for that they were not named in the writ.

35 Aff. 5.

4. If the disseisor, A. and B. and the tenant in the case before be all named, and the disseisor, A. and B. are all found insufficient, the tenant shall answer for the whole; for although the letter of this law is, where the disseisors have nothing, &c. yet these words,

35 Aff. p. 5.

chescun respondra, &c. do imply (if they have sufficient) for otherwise they cannot answer, that is, they cannot satisfy; for in that sense [answer] is here taken.

5. It shall never be inquired of the tenants insufficiencie, for against the disseisor and him must the assise of necessity be brought.

18 E. 2. tit.
Execution, 14.

6 Upon these words, *chescun respondra pur son temps*, severall judgements shall not be given, but one judgement is to be given intirely against all, and so was it ever used since this statute; but the sherife upon the execution may use such indifferencie, as justice requireth.

18 E. 2. ubi sup.

And it is said, that if the assise be brought against the disseisor and the tenant, and judgement given for the plaintife, and a writ isfueth to the sherife, and he returns, that the disseisor is insufficient, the plaintife shall have proces to levie it of the tenant.

West. 1. cap. 24.
34 E. 1. de plead
de lo nt.
22 Aff. 1. 9 H. 6.
1, 2. 1 H. 4.
ca. 8. 8 H. 6.
cap.
3 E. 6. cap. 3.

Vide the statutes of Westm. 1. 34 E. 1. 1 H. 4. & 8 H. 6. &c. where double and treble damages are given in assise, there also every mean tenant, that came in to be tenant of the free-hold under the disseisor, shall for the insufficiencie of the disseisor answer every one for his time the treble or double damages.

7. Lastly, this giveth no damages where none was recoverable in the assise at the common law, but giveth damages against the tenant for the insufficiencie of the disseisor, as hath been said.

As if he in the reversion upon a term for yeers, or tenant by statute staple, &c. be disseised, he shall have an assise to recover the state of the land, but shall recover no damages for the profits of the lands, because they belonged not to him.

12 E. 4. fol. 1.
22 Aff. p. 1.

If the disseisor committed the disseisin with force, and infeofeth A. who infeofeth B. who infeofeth C. an assise is brought against them all, and treble damages for the insufficiencie of the disseisor shall be levied upon all, according to this act *chescun respondra pur son temps*, that is, what damages should be recovered against the disseisor, if he were sufficient, shall be recovered for his insufficiencie against the mean occupiers and the tenant, and for insufficiencie of the mean occupiers, against the tenant onely.

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(4) *Purview est ensement, que le disseisee recovra damages en brise dentre foundue sur disseisin vers celui que est trouve tenant apres le disseisor.* Regularly in personall and mixt actions damages were to be recovered at the common law, but in reall actions no damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not, and the demandant in reall actions demanded no damages, neither by writ, nor count: *judex non reddit pluis, quam quod petens ipse requirit*, and it is a maxime in law, *que droit ne done pluis que soit demande*; and therefore in reall actions, where damages are given by this act, the demandant shall recover damages *pendente brevi*, because the old form of the count remaineth. The words of the act are, *Vers celui que est trouve tenant*; he may be tenant by title, by wrong, or by act in law; and of these in order.

Regula.
33 H. 6. 47.
7 E. 4. 5.
16 H. 7. 5, &c.
See li. 10.
fo. 117.
Piltords case.

42 E. 3. 7.
39 E. 3. Dam. 66.
20 E. 3. ib. 101.
22 E. 3. 2. 12 E. 3.
Dam 95. 3 E. 3.
ib. 120. 19 E. 3.
ibid. 99.

If the disseisor make a feoffment in fee, and the disseisee dyeth, the heir of the disseisee shall not recover damages by this act against the alienee; for this branch of the act provideth for the disseisee, and not for his heirs.

But

* But if a man be disseised, and the disseisee dye, his heir shall recover damages against the disseisor, but not by this branch, but by a latter branch of this act, viz. *Et soit de formes chescun tenu a render damages la ou home recover vers luy de say intrusion demesne, ou de son tort demesne*; and by this distinction the books that seemed *prima facie* to differ are well reconciled; but by the intention of this law, the heir in his writ of entry against the disseisor shall recover damages but from the death of his ancestor.

* 4 E. 3. 39. 40.
36. 23 Eliz.
Dier, 320.

22 E. 3. 2.

The disseisee shall recover damages by this act in a writ of entry *sur disseisin* in the *post*: as if the tenant cometh to the land by disseisin, intrusion, or abatement, or when by alienation it is out of the degrees; for the words be, *Vers celui que est trouve tenant apres le disseisor*, within which words he that comes in the *post* is included. Note the writ of entry in the *post* is given by the statute of Marlebridge, *cap. ultimo*; for the disseisee was driven to his writ of right at the common law.

16 E. 3.
Dam. 82.
8 E. 3. 23.
23 El. Dier, 320.

And in this second branch the tenant is onely charged with the whole damages, though there were divers mean tenants, for *chescun respondra pur son temps* is onely in the case of an assise upon the first branch; neither ought the writ of entry to be brought against any, but against him, that is the tenant of the land: but in some case another then the disseisee shall recover damages by this branch; as the successor of an abbot, but otherwise of bishops, or other sole secular bodies politique.

19 E. 3.
Dam. 99.
3 E. 3. ib. 120.
39 E. 3. ib. 66.
26 Ass. p. 4.

If the tenant cometh to the land by act in law, which he cannot withstand, and where there is no act, or default in him; in that case he shall not be charged: as if the disseisor alien to A. and his heirs, and A. dyeth without heir, the law (that there may be a tenant to a strangers *præcipe*) doth cast the land upon the lord; in this case, if the lord doth not take any profits of the lands, in a writ of entry in the *post* brought against him for the land, the lord may plead the speciall matter, and how that he never took any profits of the lands, and so discharge himself of the damages; for albeit he be a tenant of the land, yet is he no tenant against his will within the meaning of this law, because there is no wrong nor default in him.

But if the lord by escheat doth enter, and take the profits of the land, then shall he be charged as a tenant within this act, for albeit he could not withstand the escheat, which made him tenant in law, yet might he have refrained to take the profits, which in right belonged to the disseisee, but his rent or valuable services shall be recouped in damages.

And so it is in all respects, when the alienee of the disseisor dye seised, and the land descend to his heir, he may refrain from the taking of the profits, and plead the like plea, and discharge himself of the damages.

In like manner, if the disseisor make a deed of feoffment, by the which he infeoffeth A. and B. and maketh livery of seisin to A. in the name of both, B. never agreeing to the feoffment, nor taking any profit of the land, A. dyeth; in this case by the law the freehold and inheritance is vested in B. by survivor; and in a writ of entry in the *per* brought by the disseisee against B. he may, as is aforesaid, plead the speciall matter, and that he never agreed, nor took any profits, and discharge himselfe of the damages for the cause aforesaid.

First part of the
Institutes,
sect. 685.

[287]

Regula.

Ei sic in casibus consimilibus: for nemo punitur sine injuria, facto, seu defalta; and actus legis nemini est damnosus.

The statute saith, *ce' que est trovetenant*, and yet if a writ of entry be brought against two joynt-tenants, and the one disclaime, and the other take the whole tenancy upon him, and plead in barre, and it is found against him, the demandant shall recover damages for the whole against him, because he tooke upon him the whole tenancy.

8 H. 4. 5. 29 E.
3. 49. 8 E. 3.
61. 9 E. 3. 30.
25 E. 3. 51.
30 E. 3. 6.

A disseisor infeofeth A. which infeofeth B. the disseisee brings a writ of entry in the *per* and *cui* against B. which vowcheth A. who pleads and loseth; judgement for the damages shall be given against the vowchee, for he is found tenant in law.

(5) *Purview est ensement que lou avant ceux heures damages ne fuer' agardes en plea de mordauncester forsque en case, &c.*] This plea of mordaunc', and the other pleas hereafter in this act named are pleas reall, and auncestrel, and therefore no damages are recoverable (as hath been said) in them by the common law.

Lib. 6. cap. 3.
Markals case.

But yet it is to be observed once for all, that these actions in this act named, are actions *auncestrel possessarie*, and not actions *auncestrel droituel*.

Glan. li. 13. c. 2.
3, 4, &c. Bract. l.
3. fol. 282, 283.
253, 254. Brit.
fo. 180. Fleta,
l. 5. c. 1, 2, &c.

(6) *De mordaunc'.*] Of this writ you shall reade plentifully in our auncient authors, and other books.

(7) *Recoveres de vers chiefe seigniors.*] This was by the statute of Marlebridge cap. 16.

In auncient time not onely the references, as here, were ever generall, but also the citing of authorities in law were in like manner; *est tenus in nostre livres*.

(8) *Damages soient agardes en tous cases, &c.*] This purview being generall must be taken in a particular sense, that is, in all cases in the mordaunc', as in the assise, having regard to the time of the damages, *viz.* from the wrong done, for in the mordaunc' the plaintiffe shall not recover damages against the meane occupiers for the insufficiency of the abator, as in the assise for the insufficiency of the disseisor; for in construction of generall references in acts of parliament, such reference must be made onely as may stand with reason and right: and therefore seeing the writ of mordaunc' must of right be brought against the tenant of the land onely, and not against the meane occupiers (as hath been said in the former clause concerning the writ of entry) the meane occupiers cannot be charged in the mordaunc', but the tenant shall be charged for the whole damages.

3 E. 3. damag.
121.

Doct. & Stud.
lib. 2. cap. 12.

If a man hath issue two sonnes, and the father dieth seised of lands in fee simple, the eldest son dieth, the second son shall have an assise of mordauncester, and he shall make himselfe heire to his father, and he shall recover damages, not onely from such time as the right accrued unto him from the death of his brother, but from the death of his father, because he hath not the right of this land as heire to his brother, but as heire to his father. More shall be said hereof when we come to speake of the writ of cosinage, &c.

9 E. 3. 30.

In a mordaunc', if the tenant vowch, and the vowchee plead and loose, in this case the plaintiffe shall recover against the tenant the land, and the tenant in value against the vowchee, and the plain-
tiffe

tiffe shall recover his damages against the vowchee. And by this act damages shall be recovered in a *nuper obiit*.

(9) *En mesme le maner recover' home damages en brieve de cofinage, aiel, et besaiel.*] In a writ of cofinage, of the seisin of the *tresaiel*, de *seisina tritavi*, seu *atavi*, &c. it is to be scene for what time the demandant shall recover damages by force of this act, and so of the writ of *besaiel*, *breve de proovo*, and of the writ of *aiel de avo*.

And it is a rule upon this statute, that in none of these writs the demandant shall recover damages but from the death of his next immediate auncester, whose heir he is: as if there be grandfather, father, and son, the grandfather dieth seised, an estranger abate, the father dieth, the son in a writ of *aiel* must make his resort as son and heire of the father, son and heire of the grandfather, therefore he shall in that case recover damages, but from the death of his father, because he is his next immediate auncester, and from him the right descended: and so in the writ of *besaiel*, and *cofinage*; but in the case before, if the grand father had survived the father, the son shall recover damages from the death of his grandfather, because he is his immediate auncester, and the right immediately descended to him: *Et sic de ceteris*.

If a man hath issue two daughters, and dieth seised of lands, an estranger abate, one of the daughters hath issue and dieth, the aunt and the niece shall joyne in an assise of mordaunc', and the aunt onely shall recover damages till the death of the sister, and both of them from her death, which standeth upon the reason aforesaid.

If there be grandfather, father, and daughter, the grandfather dieth seised, an estranger abate, the father dieth, his wife being *privement enseint* with a son, the son is borne, he shall recover damages in a writ of *aiel* from the death of the father, for now hee is immediate heire to the father.

(10) *Vers le tenant les costages de son brieve purchase en semblent ove'sque les damages avandits.*] Before this statute at the common law no man recovered any costs of sute either in plea real, personall, or mixt: by this it may be collected that justice was good cheap of auncient times, for in king Alfreds time there were no writs of grace, but all writs remedialls were graunted freely, and Fieta saith, *Ne clerici superflua petant stipendia pro scriptura sua, constitutum est, quod tam clerici justiciar', quam cancellar' de solo denario pro scriptura unius brevis se teneant contentos*. This statute was the first that gave costs.

(11) *Costages de son brieve purchase.*] Here is expresse mention made but of the costs of his writ, but it extendeth to all the legall cost of the suit, but not to the costs and expences of his travell and losse of time, and therefore *costages* commeth of the verb *constere*, and that againe of the verb *constare*, for these *costages* must *constare* to the court to be legall costs and expences.

If a writ doth abate by the act of God, in a new writ by Journies accounts, he shall have costs for the first writ and the proceedings thereupon; but if the first writ be faulty in default of the demandant or plaintiffe, in the second writ the demandant or plaintiffe shall have no costs for such an insufficient or faulty writ.

(12) *Ensemblement ove les damages.*] For costs are in law so coupled together, as they are accounted parcell of the damages.
And

21 E. 3. 57. 28 E.
3. damag. 61. 13
E. 3. ibidem 97.
For this writ see
all the auncient
authors ubi sup.
6 E. 3. 34.
7 E. 3. 46, &c.
2 E. 3. 9. 3 E. 3.
dam. 122. 17 E.
3. 45. 2 H. 4. 13.
2 E. 3. dam. 118.

45 E. 3. 10.
35 H. 6. 23.

Mirror, l. 5 § 1.
Glav. li. 1. ca.
32.
Fleta, li. 2. c. 12.

14 H. 6. 13.

9 E. 4. 6. 13 H.
4. Execution,
118. 21 H. 6.
9 Livre de entres
Rast. 382.
Lib. 10. fol. 10.
Jentlemans calf,

13 H. 7. 16, 17. And therefore if the plaintiffe in trespasse declare to the damages of twenty marks, and the jury give twenty marks for damages, and twenty marks for costs, yet shall the plaintiffe recover in all but twenty marks, for damages and costs must not exceed * the damages, which the plaintiffe demaunds by his count, and the entry reciting both the damages and costs, *Quæ damna in toto se attingunt ad, &c.*

In an action reall, personall, or mixt, where double or treble, &c. damages are given by any statute, it hath been controverted in books, whether the demandant or plaintiffe shall recover costs, and whether the same shall be also doubled or trebled; which doubt and variety of opinions hath grown in respect the right reason of the diversity of the law in those cases hath not been observed, which is, that whensoever any statute doth increase damages to the double or treble value, &c. where damages before were given, there the demandant or plaintiffe shall recover his double or treble damages and costs also, and the costs also as parcell of the damages shall be trebled.

22 H. 6. 57. 14
H. 6. 13. 19 H.
6. 6. 7. 32. 27 H.
6. 10. 12 E. 4. 1.
F.N.B. 248. c.
But where damages double or treble are in an action newly given, where no damages were formerly recoverable, there the demandant or plaintiffe shall recover those damages onely, and no costs. For example, in an action upon the statute of forcible entry upon the statute of 8 H. 6. which giveth treble damages, in this case the plaintiffe shall recover his damages and his costs to the treble for that he should have recovered single damages at the common law, and the statute increased them to treble.

Dier 2 Eliz. 177. But upon the statute of 1 & 2 Phil. & Mar. for chasing of distresses out of the hundred, &c. whereby 5. l. is given and treble damages, the plaintiffe shall recover no costs, because this action and penalty is newly given.

27 H. 6. 10. And so in the *quare impedit* no costs, for that no damages were given at the common law.

30 E. 3. 27. 5 E.
3. dam. 114.
2 H. 4. 17. 9 H.
6. 66. nota 14 H.
6. 13.
Mich. 29 H. 6.
in Communi
Banc. Rot. 103.
5 E. 4. 7.
12 E. 4. 1.
In an action of waste against tenant for life, or yeares, the plaintiffe shall recover the place wasted, and treble damages given at this parliament, cap. 6. but no costs, because no action lay against them at the common law, but the action and damages are newly given: but against the gardein, or tenant in dower, &c. there the plaintiffe shall recover treble damages and costs also, for that an action lay against them at the common law, and for the waste damages should be recovered; and so are all the books, that seeme *prima facie* to be at variance, well reconciled.

(13) *Et tout ceo soit tenu en tous cases ou home recover damages.]* Before the making of this statute no demandant recovered damages in any reall action, but onely in a writ of dower, *unde nihil habet*, by the statute of Merton cap. 1.

Regula. This clause doth extend to give costs, where damages are given to any demandant or plaintiffe in any action by any statute made after this parliament: *Ubi damna dantur, victus victori in expensis condemnari debet.*

(14) *Soit desormes chescun tenu a render damages, la ou home recover vers luy de son intrusion demesne, ou de son fait demesne.]* This is a generall and a beneficiall branch, which we have partly expounded before in our expositions upon the second branch of this chapter; generally this branch giveth damages to him that right hath and his

his heires against the intrudor, abator, disseisor, or other wrong doer himselfe.

And *de son fait demesne*, is interpreted *de son tort demesne*, of his owne wrong. And therefore if a coparcener refuse to make partition in a writ of partition against her, the plaintiffe shall not recover damages, for this writ is a writ of right in his nature, and she hath a right *per my et per tout* to take the profits.

33 E. 3. dam. 6.
28 E. 3. ibid. 61.
13 E. 3. ibid. 97.
4 E. 3. 39, 40.
21 E. 3. 57.
7 H. 6. 35, 36.
3 E. 3. fo. 48.

If a man make a lease for life, the lessee dieth, an estranger intrudes, the lessor or his heire shall have the writ of intrusion against the intrudor himselfe, and recover damages by this act, *Et sic de similibus*.

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And that I may observe it here once for all concerning these auncient statutes both of those that are past, and those that are to come, how necessary it is not onely to know the law, but also the roote and reason, out of which the law deriveth his life, *viz.* whether from the common law, or from some act of parliament, lest if he taketh it to spring from the common law it may lead him into error in like cases.

C A P. II.

S l'enfant deins age soit tenuz hors de son heritage apres la mort son pier, cosin, aiel, ou besaiel (1), per que il covient, que il purchase briefe, et son adversary veigne en court et en respoignant alleage feoffement, ou autre chose (2) dit, per que justices agardent lenquest, la ou lenquest fuit delay jesque al age lenfant, cy passa ore lenquest auxy come il fuit de pleine age (3).

I F a child within age be holden from his heritage after the death of his father, cosin, grandfather, or great grandfather, whereby he is driven to his writ, and his adversary cometh into the court, and for his answer alledgeth a feoffment, or pleadeth some other thing, whereby the justices award an enquest, there whereas the enquest was deferred unto the full age of the infant, now the enquest shall pass as well as if he were of full age.

(1 Inst. 6. f. 3. Dyer, f. 104. 3 Bulfr. 137.)

First it is good to cleare this chapter, which is a very beneficial law made for avoyding of delay, that great enemy to justice.

*Iusticiam non iusticiam vult juris amicus,
Iusticiam non iusticiam vult juris inimicus.*

For the very text of this law in two maine points hath been falsified or mistaken.

First of auncient time some manuscripts of this chapter before printing came to us were *apres le mort son cosin, aiel, ou besaiel*, omitting these words, *son pier*; which being thewed to the judges in 8 E. 3. they were of opinion that a writ of mordaunceller was not within this law. And Fleta following that error rehearsing this chapter faith, *Apud Gloc' provisum fuit, si hæres infra ætatem petat*

8 E. 3. 23.
8 A. 12.

See the books in
3 E. 2. age 133.
42 E. 3. 13.
18 E. 3. 23, &c.

petat seisinam consanguinei, avi sui, vel proavi, et excipitur contra eum, &c. omitting patris sui.

But in the print the former error is amended, and accordeth with our latter bookes.

And it is not to be thought, that the wisdom of the parliament would provide for the seifins of them that were so farre remote, as in the writ of besaiel and cosinage, and leave unprovided the seifin that was in the next auncester of all, as of the father, &c.

And therefore the rule is good, *Satius est petere fontes, quam sectari rivulos.*

The other error, and that continueth still in the print, was, the words of the record be, *per que les justices agardent le age*, and in stead of *le age*, it is in the print *lenquest*, which is *oppositum in subjecto*, for in the writ of aiel, besaiel, and cosinage, there could be no enquest awarded before an issue joyned, neither could any enquest in those writs enquire of circumstances (as in the assise of mord³, or assise) but of the issue joyned onely, and this also may well be collected by our books.

And these words next following, [*ou lenquest fuit delay jefque al age lenfant*] are to be referred to the mordankester onely, because in that writ there appeareth a jury the first day, as in the assise of *novel disseisin*, but so it is not in the writ of aiel, besaiel, or cosinage, unlesse you will take enquest for triall, and then the sense is, where triall is delayed untill the age of the infant, and then it may have reference to all the writs named in this chapter.

Now these clouds being removed, we shall more cleerly peruse the text.

Before the making of this act, albeit the ancestor dyed seised of the lands, so as a free-hold in law was cast upon the heir; if an estranger abated, in a mordankester, aiel, besaiel, or cosinage, the tenant might have shewed, that the demandant was within age, and have prayed that the paroll might demurre untill the age of the heir, as he may do when the action is auncestrell droiturrell, that is when the ancestor hath but a right, and no possession, that is, no free-hold and inheritance at his death, so as no free-hold and inheritance descend to the heir, but a bare right; and so note a diversity between an action auncestrell droiturrell, and an action auncestrell possessiary. But at the common law, if in a mordankester, aiel, besaiel, or cosinage, the tenant did plead a feoffment, or a release from a collateral ancestor with warranty in barre, &c. there, lest the infant for want of intelligence might receive prejudice by tryall thereof during his infancie, the law in his favour at the first gave him the benefit of his age, which when it was used for delay to his prejudice, this act was made for his relief therein.

(1) *Après le mort son pier, cousin, aiel, ou besaiel.*] After the death of his father. By this is necessarily implied the assise of mordankester; and the case of the father is here put for an example, for it extendeth to the cases of the mother, brother, sister, uncle or aunt, nephew or neece, after the dying seised, of all which persons a writ of mordankester doth lye; for all the said cases are in equall mischiefe with the case of the father, and therefore are within the same remedy.

But in a formedon in the descender brought by an infant, if the feoffment of his ancestor be pleaded in barre with warranty and assets,

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18 E. 4. 23.
8 E. 3. 23.
Dier 3 & 4 Ph.
& Mar. 137.
Li. 6. fo. 3.
Markhalls case.

Braet. fol. 253,
254. Brit. f. 180.
Flet. li. 2. cap.
1, 2, 3, &c.

3 E. 2. Age 133.
33 E. 3. Age 153.
8 E. 3. 9.

assets, or a collateral warranty without assets, this case is not within this statute for two causes; first, for that is an action auncestrell droit-turell, for nothing descended but a right, and therefore had not any freehold and inheritance at the time of his death, and therefore out of the letter and meaning of this act. 2. The Formedon in the descender is in nature of his writ of right, for the issue in tail can have no writ of an higher nature, and therefore not within this statute; for seeing this act gave the infant a tryall during his minority, it gave it him in such actions as he might not be for closed of his right; but though he were barred in any of the said actions during his minority, he might at his full age have recourse to his writ of an higher nature, so as he should not be remediless, or any finall judgement given against him during his infancy.

By this it appeareth, that the writ of formedon in the reverter, or remainder, *Dum non fuit compos mentis, dum fuit infra etatem, sur cui in vita, in casu proviso, casu consimili*, and all actions of like nature are neither within the mischief, nor within the letter or meaning of this act, for that none of them are actions auncestrell possessary, as hath been said.

(2) *Alledge feoffment ou auter chose.*] A feoffment with warranty from the same ancestor is a barre to the assise, and no barre in the assise of mordancester; and therefore this is to be intended of a feoffment of a collateral ancestor with warranty, or a release with warranty from such an ancestor, or such other matter, whereunto the infant during his minority could not answer, as hath been said, at the common law: and the rule of Glanville is good, *Generaliter verum est, quod de nullo placito tenetur respondere is, qui infra etatem est, per quod possit exheredari, nec ipsi minori super recto respondebit donec plenam habuerit etatem*. And that of Bracton, *Quod minor ante tempus agere non potest maxime in casu proprietatis, nec etiam convenire, differe-tur usque etatem, sed non cadit breve*.

(3) *Si passa ore lenquist come il fuit de plein age.*] So as now such pleading, triall and proceeding shall be in these four actions, as if the plaintife were of full age.

42 E. 3. 13.
34 H. 6. 3, 4;
18 E. 4. 23.
Dier 3 & 4 Ph.
& Mar. 137.
Lib. 2. fol. 3.
Markhalls case.

12 E. 2. Age 145.
8 E. 3. 36. 59.
3 E. 3. Age 72.
34 H. 6. 3, 4.
Markhalls case.
ubi supra.

30 Aff. p. 25.
43 Aff. p. 20.
9 E. 2. Age 143.
19 E. 2. Mord.
45. 8 E. 3. 23.
8 Aff. 12. 6 E.
4. 11. 43 E. 3. 5.
18 E. 4. 23.
Glanv. lib. 13.
cap. 15.

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Bract, lib. 5.

C A P. III.

ESTABLIE est ensement, que si home alien tenement (1), que il tient per le * ley Dengleterre (2), son fits ne soit pas forbarre (3) per le fait son pier (de que nul heritage luy descend) (4) a demander et reco-verer per brieve de mordancester (5) de la seisin sa mior, tout face le charter son pier mention que luy et ses heyres sont tenus a la garrant. Et si heritage luy descend de part son pier, donques soit il forclose de le value del heritage, que luy est

IT is established also, that if a man aliene a tenement, that he holdeth by the law of England, his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover by writ of mortdauncester, of the seisin of his mother, although the deed of his father doth mention, that he and his heirs be bound to warranty. And if any heritage descend to him of his father's side, then he shall be barred for

est descendus. Et si en tiel cas apres la mort son pier, heritage luy soit descendus per mesme le pier (6), donques avera le tenant vers luy recovery de la seisin sa mier (7), per brieve de judgement que issera hors de rolles des justices, devant queux le plee suit pleade, a resom son garrantie scome avant ad estre fait en auters cases, ou le garantie vient en court, et dit que riens ne luy est descend de luy per que fait il est vouche. Et en mesme le maner eit lissue le firs recover per brieve de cosinage, aiel, et besaiel. Ensement et en mesme le maner ne soit l'heire la feme (8) apres la mort le pier et la mier barr d'acion a demander le heritage sa mier (9) per brieve d'entre (10), que son pier en temps sa mier aliena, dont nul fine nest levie en court le roy (11).

for the value of the heritage that is to him descended. And if in time after any heritage descend to him by the same father, then shall the tenant recover against him of the seisin of his mother by a judicial writ that shall issue out of the rolls of the justices, before whom the plea was pleaded, to resummon his warranty, as before hath been done in cases where the warrantor cometh into the court, saying, that nothing descended from him by whose deed he is vouched. And in like manner the issue of the son shall recover by writ of cosinage, aiel, and besaiel. Likewise in like manner the heir of the wife shall not be barred of his action after the death of his father and mother, by the deed of his father, if he demand by action the inheritance of his mother by a writ of entry, which his father did aliene in the time of his mother, whereof no fine is levied in the king's court.

* Custom of Norm. cap. 119. fol. 138. (Vaughan 366. Stat. 4 & 5 Ann. c. 16. Bro. Formedon, 73. 5 Rep. 80. 8 Rep. 52. 1 Inst. 365, 366. 381. a. 382. a. 383. a. b. Dyer, f. 148. Fitz. Garranty, 5. 9 Rep. 26. Fitz. Cui in vita, 7, 8. 32 H. 8. c. 28. Keilw. 104. b. 124, 125.)

Bract. li. 4. fo. 321, 322.
Fleta, li. 5. c. 34.
See the first part of the Institutes, sect. 197. 724.
726, 727. 32 E. 3. Gar 30.

Before the making of this statute, when the heir demanded inheritance on the part of his mother, the warranty of the tenant by the courtesie, whose heir he was, barred him of that inheritance without any assents. This statute doth provide, that it shall not be a barre without assents.

But at the common law, if the heir had been within age, and his entry congeable, though he had not entred in the life of the ancestor, the warranty bound him not, but that he might enter and avoid the warranty; but if he were driven to his action, the warranty had bound him, and so it was in case of a *fem covert*.

Temps E. 1. 87.
31 E. 1. ibid. 95.
7 E. 3. 53.
Bract. li. 4. fol. 228.

(1) *Alien tenements.*] This extendeth to alienations made after the statute, and not before, for it is a rule and law of parliament, that regularly *nova constitutio futuris formam imponere debet, non præteritis*.

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See before ca. 1. W. 2. cap. 41.
Temps E. 1. gar. 87. 27 E. 3. 80.
14 E. 4. gar. 5.
17 E. 3. 83.
Dier 4 Mar. 148.
First part of the Institutes, sect. 724, 725.

This word (alien) doth properly signifie a transmutation of possession, but yet a release or confirmation of the tenant by the courtesie with warranty, where no transmutation of possession is, is within the same mischief, and therefore is within the remedy of this statute; for otherwise the statute should serve to little purpose.

(2) *Tient per la ley Dangleterre.*] If the heir demand the heritage of the part of his father, and the warranty on the part of his mother be pleaded, this case is not holpen by this statute, as in the first part

part of the Institutes it appeareth; for this act by this branch provideth onely for the case of the tenant by the courtesie, and therefore tenant for life, or tenant in dower is not within the case or classis of this act; but as concerning the case of the tenant by the courtesie, which is the case of this act, this statute is taken by equity, as heretofore hath been partly touched, and hereafter shall appear.

See the Statute of 11 H. 7. c. 20. Temps E. 1. gar. 86. 12 Aff. p. 9.

(3) *Son fils ne soit pas forbarre.*] This doth not onely extend to the son, but to the daughter, and to any other heire immediate, as here the example is put, or mediate, as cosin and heire, be they never so remote.

11 E. 3. gar. 83.

(4) *De que nul heritage luy descend.*] That is to say, from whom no lands or tenements in fee simple of the yearly value of the inheritance of the part of the mother doth descend to the heire, for the warranty is no barre without such assents.

And by the equity of this statute the warranty of tenant in taile is no barre unlesse there be assents in fee simple descended.

11 E. 2. garrant. Statham.
21 E. 3. 28.
38 E. 3. 23.
Pl. Com. 110.
Lib. 8. fol. 53.
Syms case.
Doct. & St. fo. 76.
Kelwey 124, 125.

Albeit the word heritage be generall, yet hath it in construction a speciall signification, for the assents must respect the essentiall quality of the inheritance, whereof the heire is to be barred, and that is, that it be a locall, possellary, and certaine inheritance, as lands, rents, commons, and the like: and therefore an annuity, that is a personall inheritance, and lieth in action, nor any right of action of inheritance is no heritage within this statute, untill it be reduced into possession, *Et sic de similibus.*

(5) *Per briefe de mordauncester.*] And after the writs of aiel, besaiei, and cosinage are also named.

11 E. 2. gar. 83.
8 E. 2. ibid. 81.

The intendment of the makers of this act is, that the warranty of him that held by the courtesie should not be a barre to the heir of his wife, unlesse he left assents; and the makers of the statute could not put all the cases that might happen, but did put the strongest cases, and by construction the lessee shall be included, and therefore in all actions, as the writ of right, the formedon in the descender, the writ of entry in the *per*, the writ of entry *ad communem legem*, and the like are within this statute.

46 E. 3. age 76.
4 E. 2. gar. 63.
F.N.B. 208. b.

(6) *Heritage luy descend de mesme le pier.*] If a feignory of homage and fealty descend to the heire, this is no assents, but if a tenancy doth escheat to the heire, although it were never in the father, this shall be accounted assents, because the feignory that came from the father was the means to bring it to the heire, *Et sic de similibus.*

16 E. 3. age f. 47.
Br. 5. 6 H. 4. 1.
Kelwey 104. b.
Pl. Com. Chapmans case.

(7) *Donques avera le tenant vers luy recovery de la seisin sa mere.*] By this act the warranty of a tenant by the courtesie being pleaded with assents descended is a bar to the heire of the mother; but if assents be not then descended, but after it descend from the same father, then the tenant shall have recovery of the inheritance of the mother by a writ of judgement, as this act appointeth: and by the equity of this act it is taken, that in a formedon in the descender, if the warranty of tenant in taile be pleaded, where no assents is then descended, but after assents doth descend to the issue, there the tenant shall have a *scire facias* to have the assents, and not the land in taile, for if he should have the land in taile, it was considered, that if the issue aliened the assents, his issue might recover the land tailed in a formedon: wherein is to be observed the great wisdom of the sages of the law in auncient times, ever so to resolve, and give

Hil. 9 E. 2. 62. b.
in Entr. sur diff.
43 E. 3. 26.
46 E. 3. 29.
Pl. Com. 16. 110.

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judgement, *Ut sit finis litium*. But in none of the bookes that treat of this matter is exprest how the tenant shall demeane himselfe in pleading to take advantage upon this statute of the assêts, which after descended.

And therefore if in a mordanc', &c. the tenant plead the warranty of the tenant by the curtesie with assêts (as in some of the books it is said) or in a formedon the tenant plead a lineall warranty with assêts, and the demandant take issue upon the assêts, and it is found that nothing descended, and thereupon the demandant recover, and after the recovery assêts descend, the tenant shall never have a *scire facias* to take benefit of this act, for he that will take benefit of this act must not begin with an untruth, but must plead the warranty, and confesse the title of the demandant, and pray the advantage of this act, when assêts shall descend, and upon this record when assêts descend, he shall have a *scire facias*; for our act saith, *Per brieve de judgement que issera hors de relles des justices*; and this exposition agreeth with the words of this act, *a resummon son garrantie sicome avant ad estre fait en auters cases ou le garrantee vient en court, et dit, que riens ne luy est descend' de luy, per quel fait il est vouch*: for there without question after assêts shall descend, upon the record a *scire facias* shall be awarded.

(8) *Ensement et en mesme le maner ne soit le heire la fem, &c.*] This is the last branch of this act.

(9) *Barre d'acion a demander le heritage sa mere, &c.*] By the first branch the act provideth remedy against the warranty made by tenant by the curtesie after the decease of his wife; this branch provideth remedy against the alienation of the husband with warranty during the life of his wife: upon these words some have conceived, that this warranty shall not binde, albeit assêts doth descend from the father, because assêts is not mentioned in this branch, as it is in the former. But these words, *ensemement et en mesme le maner*, doe so couple this branch by reference to the former, as if in this case assêts doth descend, by the warranty and assêts the heire is barred.

If the husband make a feoffement in fee of the wives land with warranty, and hath issue by her, and they both die, in a writ of entry *sur disseisin* brought against the feoffee he voweth the heir of the husband, who is also the heire of the wife, he may upon this statute devolve the ten' of the warranty, for that the husband left no assêts, and that he hath an action as heire to his mother to recover the land, and if he should enter into the warranty, he should foreclose himselfe of his action, and therefore by the rule of the court he entered not into the warranty.

(10) *Brieve dentre.*] That is a *sur cui in vita*, but if the lands were entailed to the wife, and after the statute of *donis condic' de W.* 2. the heire brought a formedon, the collaterall warranty of the husband shall barre in that action.

(11) *Dont nul fine est levie en court le roy.*] This is to be understood whereof no fine is lawfully levied, that is by the husband and wife, for then her heire claiming a fee-simple is barred; but a fine levied by the husband alone was a wrong, and at that time a discontinuance, and therefore such a fine was not within the intention of this act.

Pl. Com. 110.

Lib. 8. fol. 53.
Syms case.

8 E. 2. gar. 81.
Hil. 9 E. 2. ubi
sup.
17 E. 3. 51.
27 E. 3. 89.
Hil. 9 E. 2. ubi
sup.
Thomas de Mer-
tons case.

See the first part
of the Institutes,
cap. Gar. sept.

27 E. 3. 89.
Pl. Com. 57.
First part of the
Institutes, sect.
719, 730, 731.

CAP. IV.

ENSEMENT si home lessa sa terre a ferme (1), ou a trouver estovers en viver, ou en vesture (2), que amount a la quart part de la veray value (3) de la terre, et celuy que la terre tient (4) issint charge la lessé giser fresh (5), issint que home ne puit trover distresse per deux ans (6), ou per trois, a faire le ferme render, ou a faire ceo que est contenue en lescript (7) ou leas: Establie est, que apres les deux ans passés eit le lessor action (8) a demander la terre en demeign' (9) per brieve que il avera en le chancery (10). Et si celuy vers que la terre est demande, veigne avant judgement, et render les arrerages et les damages (11), et trova suerty tiel come la court verra que soit suffisant (12) a render en apres [soulouque] ceo que est contenue en lescript du leas, ci, reteign' la terre. Et sil demurr' tanque ele soit recover per judgement, soit il forcloze a remnant (13). W. 2. cap. 21. & cap. 41.

ALSO if a man let his land to ferm, or to find estovers, in meat or in cloth, amounting to the fourth part of the very value of the land, and he which holdeth the land so charged letteth it lie fresh, so that the party can find no distresse there by the space of two or three years to compel the farmor to render, or to do as is contained in the writing or lease; it is established, that the two yeares being passed, the lessor shall have an action to demand the land in demean by a writ which he shall have out of the chancery. And if he against whom the land is demanded come before judgement, and pay the arrerages and the damages, and find surety (such as the court shall think sufficient) to pay from thenceforth as is contained in the writing of his lease, he shall keep the land. And if he tarry until it be recovered by judgement, he shall be barred for ever.

(7 H. 8. f. 28. Fitz. Refcit, 96. 105. Fitz. Scire fac' 154. Kcl. f. 75. 132. Fitz. Cessavit. 21. 10. 12. 19. 20. 23. 25. 27. 29. 32. 33. 39. 49. 52. 53. 56. Rast. pla. f. 111. Regist. 237. 13 Ed. 1. stat. 1. c. 21. 41. 10 Ed. 2.)

What the common law, or some custome was before the making of this statute, you may reade in Bracton who wrote a litle before this statute; Item poterit intervenire justum iudicium ab initio, ut in distributionibus faciendis, et vertitur ex post facto in disseisinam, sicut in burgagiis, terris, tenementis, et tenuris exterioribus. Ut si dominus per considerationem curie sue pro defectu servitii ceperit tenementum tenentis sui in manum suam, sicut simplex naniū, donec de redditu fuerit satisfactum; sed cum talis, cuius ten' fuerit, obtulerit de satisfaciend' de redditu et arreragiis, restitui ei debet possessio, et si dominus hoc recusaverit, tunc erit manifesta disseisina. And afterwards in another place he saith; Item si propter paupertatem possessionem dereliquerit, et ita quod dominus capitalis pro defectu servitii tenementum suum in manum suam ceperit et retinuerit, vel alio excolend' dederit, &c. satis moritur tenens seifitus.

Bract. lib. 4.
fol. 205. b.

Fol. 262.

And I reade amongst auncient records, that a cessavit was brought in the raigne of king John, but this act is the first statute that was made by authority of parliament concerning the cessavit; after this came the statutes of Westm. 2. and 10 E. 2. De Gam-

Int' Record 87.
Regis Johannis.

Z 2

letto;

W. 2. c. 21 & 41.
10 E. 2. Stat. de
gimletto. Vet.
Mag. Cha. f. 122.
Pasch. 17 E. 3.
coram Rege.
Rot. 139. Lon-
don. First part
of the Institutes,
sect. 1. 45 E. 3.
27. 33 H. 6. 53.
13 E. 2. Cessavit
51. F.N.B. 209.
g. See Mich.
9 E. 1. in Banco
Rot. 39. Kanc.
Hil. 13 E. 1. in
Banco Rot. 7.
Pasch. 16 E. 1.
Rot. 5.

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11 E. 2. cessav.
50. 21 E. 3. 23.
45 E. 3. 15. 27.
21 H. 6. 50. 33
H. 6. 53. F.N.B.
209. 11 H. 4. 3.
27 H. 8. 28.
Kel. 104, 105.

Pasc. 16 E. 1. in
Ban. Rot. 5.
*Non potuit exco-
lere propter duras
distinctions.*
Regist. 237.
F.N.B. 210. a.
6 E. 3. 45. 8 E.
3. 46, 47. 10 E.
3. 6. 21 E. 3. 20,
21. 30 E. 3. 22.
43 E. 3. 15.
8 H. 6. 17.
33 H. 6. 8.

Temps E. 1. ces-
savit 58. 10 E. 4.
1. 2. 30 E. 3. 22.
12 L. 3. cessavit
21. 35 H. 6.
ibid. 7. F.N.B.
208, 209.

letto; and note that the writ framed upon this act doth recite this statute.

(1) *Leffa sa terra a ferme.*] *Leffa, demise, nota dimittere* is a good word of a feoffment, and therefore if a man let or demise lands to a man and his heires, and make livery of seisin, this is a good feoffment, and so is this word here to be intended, for a *cessavit* lieth not against tenant in taile, or tenant for life, unlesse the remainder be limited over to another in fee, so as he is tenant to the lord, as tenant by the curtesie is.

(2) *Esfovers en viver ou vesture.*] That is to say, *esfovers in victu et vestitu*, of this sufficient hath been said in the exposition upon the seventh chapter of *Magna Charta*.

(3) * *Ala quart part de la verie value.*] *Vide* for fee ferme the exposition upon the twenty seventh chapter of *Magna Charta*. And such rent or other profit, as was answered to the owner of the land, was accounted the verie value.

(4) *Celui que la terre tient.*] So as there must be a tenure betweene the feoffor and the feoffee in fee-simple, for a *cessavit* lieth not upon a reservation without such a tenure, and so was it adjudged in 11 E. 2.

At the making of this act all estates of inheritance were in fee simple, and therefore the donor upon an estate in taile (created by a statute made after this act) shall not have a *cessavit* against the donee in taile, nor against tenant for life; neither for the cesser of the mesne a *cessavit* lieth for he holdeth not the land as this act speaketh, which ought to be overt, and sufficient to the distresse of the lord, which is a good plea in a *cessavit*.

And in this writ the tenure between the demandant and the tenant is traversable, because this writ is grounded upon the tenure by force of this act; but in this writ the seisin is not traversable, because it is not grounded upon the seisin, neither is the quantity of the services traversable, but to be taken by protestation; for whether he hold by more, or lesse, the *cessavit* lieth; but in an avowry the seisin is traversable, for that is grounded as well upon the seisin, as the tenure: also in the *cessavit* the land is to be recovered, and not the services, and it is in his nature a writ of right, and the jury shall measure in their consciences the quantity of the service.

Neither is *hors de son fee* a good plea in a *cessavit*, because (as hath beene said) the tenure is traversable.

(5) *Lalesest giser fresh.*] The tenant of the land is called tenant *per avails*, because it is presumed, that he hath avails and profit by the land, and therefore the law never expected, that he would let the land lie fresh, that in his proper sense is as much, as unmanured, or unoccupied.

It is said in law to lie fresh, not onely when there is no cattle, or other thing distrainable upon the land of the value of the rent, or other profit behinde; but also, though there be a sufficient distresse to be taken, yet by construction upon this act, if the land be so immured or inclosed about, as the lord cannot come to take and carry away the distresse to the pound, it is said to lie fresh, that is, without profit as to the lord, for though it be sufficient, yet it is not sufficient to his distresse, so as the land must lie open and sufficient to the distresse of the lord: or else it is said in law to lie

lie fresh within this statute, which construction is worthy of observation.

(6) *Per deux ans.*] *Per biennium*; so as by these words is implied, that it lieth onely for annuall services, and not for homage, fealty, or the like. And upon these words, *rien arere*, &c. is a good plea in this action.

This act saith, if the tenant let the land lie fresh, yet if a stranger wrongfully occupy the ground by putting in his cattle and feeding of it, or otherwise by manurance of the ground, this is sufficient to the distresse of the lord within this act, for the lord may distrein them, which is the end of this act; otherwise it is in this case, if cattle escape, and the owner freshly follow to take them.

(7) *Ou a-faire chose que est contenue en lescript.*] By these words the *cessavit* did lie for non-payment of a fee ferme contained in the deed.

(8) *Eyt le lessor action a demaunder terre en demeign'.*]

Five doubts were conceived upon this act:

1. Whether the heires of the lord might have a *cessavit*, because the words be *eyt le lessor*.

2. Upon the same words whether the grauntee of the feignory with attornement, or tenant by the curtesie, tenant in dower, &c. might have a *cessavit*.

3. Whether against the alienee of the tenant or his disseisor, &c. a *cessavit* did lie upon this act, because the letter of this law extended but to the feoffee.

4. Whether the *cessavit* should be against the heires of the feoffee.

5. Whether it extended to rents and services created without deed, for as much as this act speaketh of such onely, as were reserved by deed.

These doubts were conceived upon that notable rule delivered in our bookes in the case of *cessavit*, *Ou recoverie est done en especiall case per estatut, il coveit que home aver tous voies accord al statut.*

As to the first Britton saith, *Fee fermes sont terres tenus en fee a responder pur eux per an le verie value, ou plus, ou meyns, de quel rent si les feoffees cessent a respondre per deux ans ensemble per tant accrest action as feoffors et leur heires a demaunder les tenements en demeane.* But notwithstanding this point and the residue of the doubts are briefly and excellently remedied by the statute of W. 2. made seven yeares after this act, as we shall shew when we shall come to it.

(9) *Demaunder sa terre in demeign'.*] Upon these words it is concluded that a *cessavit* doth not lie of a mesnalty consisting of rents and services, but this writ lieth against the tenant *per avails*.

It is holden that a *cessavit* doth lie of an advowson, and yet it is not in demesne, and overt, and sufficient to his distresse cannot be pleaded.

(10) *Per brieve que il avera en la chauncery.*] Hereupon also great question grew for the forme of the writ, but in the end a writ was conceived upon this act, as it appeareth in the Register, and F. N. B.

12 E. 3. cessavit.
8 E. 3. 46, 47.
17 E. 3. 57. 27
E. 3. 17. 14
H. 4. 44. 33 H.
6. 44. 6 H. 7. 7.
8 H. 7. 2. 30 F.
3. 22. 14 E. 3.
cessavit 20. 19
R. 2. surety 27.
35 H. 6. cessavit
7. F. N. B. 209.

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Regist. 237.

45 E. 3. 15.

W. 2. cap. 21.

13 E. 3. gard. 38.
21 E. 3. 44.
27 H. 8. 28.
1 H. 4. 3.
12 R. 2. cessav.
46.
5 H. 7. 37. 43 E.
3. 15. 31 E. 3.
cessavit 24.
33 H. 6. 34.
Regist. 237.
F. N. B. 210.

45 E. 3. 27. 29.
21 E. 3. 23. 33 H.
6. 19. 7 E. 3. 58.
13 E. 3. cessavit
29. 15 H. 7. 10.

(11) *Avant judgement, et tender les arrerages et damages, &c.* After verdict and before judgement, the tenant may tender the arrerages, &c. He ought to tender the arrerages in proper person, though he be a lord of parliament, for the words of this act be, *Celuy vers que le terre est demande vient, &c.* and he ought to finde surety.

Tr. 9 E. 2. f. 65.
in libro meo in
cessavit.

In a *cessavit* after the enquest joyned, the tenant made default, and at the retourne of the *petit cape*, the tenant appeared, and offered to pay the arrerages with damages, and to finde such surety as the court would award, which was received, because he came before judgement, and found surety, that is, three pledges, which bound their lands to the distresse of the lord in the same forme as the tenant his land is bound.

5 E. 3. 30.
7 E. 3. 58.
21 E. 3. 23.
25 E. 3. 42.
6 E. 2. cessavit
49.

He ought to tender all the arrerages, for so are the indefinite words to be taken as well before as after the two yeares, and damages to be allowed of by the court, but if the demandant doe not alledge how much is behinde over and above the two yeares, &c. and that be found by the jury that findes the issue, the tenant need not tender more then for the two yeares, because it appeare not of record, or by necessary consequence as such arrerages as incurre hanging the writ; and for any arrerages incurred before this tender, the lord shall not avow, because the tenant ought to have paid all.

17 E. 3. 57.

13 E. 3. cessav.
20.
13 E. 3. ubi su-
pra.
14 H. 4. 3. 4.

The court may asseſſe the damages by their discretion.

Where this act saith, that he shall tender the arrerages, it is to be understood of such things as may be yeilded, as rent, &c. but of suit, divine service and such like which cannot be yeilded, damages shall be paid for the same.

40 E. 3. 40. 31 E.
3. cessav. 23.
F.N.B. 209. a.
Mic. 31 E. 3. 60.
50 & 51. in lib.
meo in cessavit.

If two joyntenants be impleaded in a *cessavit*, and the one make default, &c. the other cannot tender the arrerages but for the moiety, for the other joyntenant hath * power to alien and lose his moiety, the words of the statute be, *Celuy vers que la terre est demaund*, and the land is demanded against both.

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But if A. and B. be seised to them and the heires of A. and B. make default, A. may tender for the whole in respect of his remainder.

6 E. 2. tit cessa-
vit 49.

In a *cessavit*, the jury in anno 6 E. 2. found the cesser, and that the rent was behinde by 30 yeares, part of which time was before the statute whereupon the writ was grounded, and yet the demandant shall recover all the arrerages, as is well warranted by the statute.

If the demandant in the *cessavit* be outlawed in a personall action, this outlawry may be pleaded in barre of the action, because the arrerages are due to the king.

25 E. 3. 44.

(12) *Et trovera suertie come le court verra sufficient, &c.* This surety is referred to the discretion of the court, for herein upon these words there is a rule conceived, *Suretie est al court d'ordeiner, et al tenant d'assent et affirmer.* And therefore being referred to discretion, in divers cases severall sureties have been ordained upon due consideration had in respect of the state of every particular case.

50 E. 3. 23.
19 E. 4. 5. 17 E.
3. 57. 21 E. 3.
23. 29 E. 3. 33.
Vet. N. E. 133.

Sometime in respect of the quality of the demandant, as if he be a body politique or corporate, ecclesiasticall or temporall for feare of a mortmain, therefore their collaterall surety is to be found, &c.

Vide

Vide 15 Martini, anno 4 E. 3. coram iustic' itin' apud Dunstable, surety was graunted to the prior of D. demandant in a *cessavit*, that he should distrain for the rent in other lands.

^a Sometime in respect of the quality of the tenant in respect he is a body politique or corporate, or a feme covert, or an infant.

^b Sometime in respect of the tenancy it selfe, as if it be a house, &c. lest the tenant should waste it, and so make it not sufficient to pay the rent.

Though the statute referreth the surety to the discretion of the court, yet will it be good to follow precedents of former times, for *discretio est discernere per legem quod sit justum*.

^c Albeit it is for the benefit of the demandant to have surety, yet he cannot waive it, because it is made parcell of the judgement.

^d But what if the surety be a judgement of the court, that if he cesse againe by one or two years, *que la t're incurgera la remnant*, that is, that he shall have judgement to hold the land, &c. for ever, wherein the tenant shall never tender any more, and his remedy, that after such cesser againe, he shall have a *scire facias* upon the record, and if the tenant be warned and make default, &c. the demandant shall have judgement against him for ever.

If the tenant after a judgement given against him in a *cessavit*, that if he cesse againe, *Que la terre incurgera le remnant*, in that case if the tenant alien, the alienee shall not be bound by the said surety or judgement, because it bound him that was tenant in the *cessavit* onely, and upon a new cesser a new *cessavit* must be brought. But if the surety or judgement be, that if he or his assignes doe cesse againe, &c. then the assignee is bound thereby, and upon a *scire facias* the matter shall come in question.

[13] *Soit forclosé a remnant*.] That is, shall be forclosed or barred for ever, for this writ is a writ of right in his nature; by this act if the lord recover by default, judgement shall by these words, [*Soit forclosé del remnant*] shall be given, and shall be a barre in a writ of right: otherwise it is of a judgement by verdict.

See more of the writ of *cessavit* in our exposition upon the statute of W. 2. cap. 21.

^a 10 E. 4. 5.
Temps E. 1. cessavit 55, 56.
19 R. 2. surety
27. 15 E. 2. ibid.
20. 19 E. 2.
ibid. 21. 4 E. 3.
42. 13 E. 3.
cessavit 29. 21 E. 3. 23. Doct. & Stud. lib. 2.
^b 41 E. 3. 29.
19 E. 4. 5.
^c 50 E. 3. 23.
19 E. 4. 5.
^d 41 E. 3. 29.
19 R. 2.
Scire fac' 134.

6 E. 3. 45.
4 E. 3. droit 41.

CAP. V.

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ENSEMENT est purview, *que home eit desormes* (1) *briefe de waste* (2) *en le chancery vers home que tient per le ley Dengleterre* (3), *ou en auter maner a terme de vie* (4), *ou des ans* (5), *ou feme que tient en dower* (6). *Et celuy que serra attaint de waste* (7), *pérde le chose que il aver' waste* (8): *et ouster ceo face gree del treble de ceo que le waste serra taxe* (9).

Et

IT is provided also, that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. And he which shall be attained of waste, shall leese the thing that he hath wasted, and moreover shall recompence thrice so much as the waste shall

Z 4

shall

Et en waste fait en gard' (10), soit fait solongue ceo que contenue est en le grand charter, cap. 4. Et per la ou il est contenue en la grand charter, que celui que avera fait waste en garde, perdr' le garde: accorde est, que il rendra al heire les damages del waste (11), si issint soit que la garde perdue ne suffist mie a le value des damages, avant lage del heire de mesme le garde (12). W. 1. cap. 21. Articuli super chartas, cap. 18.

shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the great charter. And where it is contained in the great charter, that he which did waste during the custody, shall leese the wardship, it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship.

(Dyer, 25. Fitz. Wast. 62. 117. 146. Bro. Parl. 17. Fitz. Judgement, 85. 134. 255. Fitz. Damage, 7. 22. 42. 52. 90. 114. 133. 1. Inst. 53. b. 54. b. 200. b. 355. b. 1. Roll, 91. 97. 156. Rait. 689, &c. Savill, 42. 9 H. 3. c. 4. Regist. 72.

12 H. 4. 3.
21 H. 6. 28.
Doct. & Stud.
lib. 2. cap. 1.
Regist. 72.
First part of the
Institutes,
sect. 67.

At the common law waste was punishable in three persons, *viz.* tenant in dower, tenant by the curtesie, and the guardian, but not against tenant for life, or tenant for yeares; and the reason of the diversity was, for that the law created their estates and interests, and therefore the law gave against them remedy: but tenant for life, and for yeares came in by demise and lease of the owner of the land, &c. and therefore he might in his demise provide against the doing of waste by his lessee, and if he did not, it was his negligence and default.

7 H. 6. 35.
8 H. 6. 34.
32 H. 6.
Bract. l. 4.
fo. 315. Doct.
& Stud. l. 2. c. 1.
F.N.B. 55. c.
W. 2. cap. 14.

There is also an action of waste by custome, as in London, &c.

Now the remedy at the common law was in two degrees: first, if he that had the inheritance did feare (for example) that tenant in dower would doe waste, he that had the inheritance might before any waste done have a prohibition directed to the sheriffe, that he shall not permit her to doe waste in this forme.

Rex vicecom' salutem. Præcipimus tibi quod non permittas quod talis mulier faciat vastum, vel venditionem, vel exilium de terris, hominibus, redditibus, domibus, boscis, vel gardinis, quæ tenet in dotem de hereditate talis in tali villa, ad exheredationem ipsius talis ne amplius, &c.

Regula.

And Bractons advice hereupon is as followeth:

Et hoc faciat tempestive, ne per negligentiam damnum incurrat, quia melius est in tempore occurrere, quam post causam vulneratam remedium quærere.

Lib. 5. fol. 115.
Foljambes case.

And the sheriffe having the warrant of this writ may, as in case of a writ of *estrepement*, take *posse comitatus*, and withstand the doing of any waste.

Regula.
Vide W. 2.
c. 14.

And this was the remedy that the law appointed before the waste done by the tenant in dower, tenant by the curtesie, or the guardian, to prevent the same, and this was an excellent law, for *præstat cautela quam medela*, and preventing justice excelleth punishing justice. And this remedy may be used at this day. Now after waste done there lay an action of waste at the common law in this forme. *Rex vicecom'. Salutem. Si talis fecerit te securum de clamore suo prosequendo, tunc pone per vad', et salvos plegios talem mulierem, &c. quod sit coram iusticiariis nostris, &c. essensura quare fecit.*

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vassum, venditionem, et exilium de terris, hominibus, redditibus, boscis, vel gardinis, quæ tenet in dotem de hæreditate talis, in tali villa, contra prohibitionem nostram, et habeas ibi nomina plegiorum, et hoc breve, teste, &c.

Where in this writ it is said *contra prohibitionem nostram*, the plaintiffe should have well maintained his writ, albeit no writ of prohibition of waste had been sued out before, for that the common law was a prohibition of it selfe, and so saith Bracton speaking of the waste done by a gardien, *Dominus vassum emendabit sic, quod damna restituet, siue vassum fecerit ante prohibitionem, siue post.*

By this writ of waste the plaintiffe, if the waste were done in woods, *Et mulier inde per inquisitionem convincatur, talis erit ei pœna infligenda, et in tantum erit coercenda, quod de cætero nihil capiat in bosco illo, nisi (per visum * forestariorum hæredis) rationabile estoverium suum, et talis servitus imponetur ei ad pœnam, et de forestario apponendo fiat tale breve* (which there you may reade at large) *Si custos de vasso convincatur, amittit custodiam, et restituet damna, et det domino regi misericordiam, quod non est in muliere, si de dote sua fecerit vassum, quia dotem suam non amittit, sed custos vel curator ei adjungatur, qui impediat ne faciat, et damna debet refundere.*

So as the tenant in dower (and likewise the tenant by the curtesie) had two punishments, *viz.* to yeild damages to the value of the waste, and a keeper or curate to be appointed to them, who should withstand any waste to be afterwards done by them.

And the gardien had three punishments. 1. He should lose the custody. 2. He should yeild damages to the value of the waste: and 3. He should be fined to the king, for that contrary to the trust in him reposed by reason of his guardianship he did waste to the disherison of the heire, and this did hold as well in case of a gardien in *droit*, as a gardien in *fait*.

And the reason wherefore at the common law the action of waste did lie against the tenant in dower, or tenant by the curtesie, albeit they had assigned over their estates, was, because no action of waste by the common law lay against the assignee for waste done after the assignment, therefore the action of necessity did for such waste (after the assignement) lie against the tenant by the curtesie, or tenant in dower, which law continueth to this day.

But if the heire granted away the reversion and the tenant attourned, the action failed at the common law, as hereafter shall be shewed more at large. Hereby it appeareth how necessary it is for the understanding of this act, to know what the common law was, and the reason thereof, before the making of our statutes, whereof you shall reade more largely in Bracton both concerning the points abovesaid, and other matters concerning waste, worthy of your reading and observation.

But at the common law if the gardien in *droit* had assigned over his estate and interest, the heir should have had an action of waste for waste done after the assignement against the assignee, for he was gardien in *fait*, and so within the rule of the common law.

(1) *Home eyt deformes, &c.*] Here the persons are not named who shall have the action of waste, but that is left to the common law to judge thereupon, of which matter you shall reade plentifully in our books, and it were too long to be here inserted, neither

4 H. 3.
Wast, 129.
ib. 140. 8 R. 2.
tit. Attachment
sur prohib. 15.
Bract. l. 4.
fo. 285.
Vide W. 2. c. 14.

Bract. fo. 315,
316.

* *Forestarius* in
ancient authors,
is taken for *custos boscorum*, a
woodward,

10 H. 3.
Wast. 138.
20 H. 3. ib. 139.
34 E. 3.
Wast, 146.

Temps E. 1.
Wast, 132.
30 E. 3. 16.
38 E. 3. 23.
40 E. 3. 33.
11 H. 4. 18.
Doct. & Stud.
l. 2. ca. 1.
F.N.B. 56.

Bract. ubi suprag
First part of the
Instit. sect. 67.
F.N.B. 56. b.

neither doth it tend to the exposition of this act being left to the common law.

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(2) *Briefe de waste.*] *Breve de vasto.* Of this word *vastum* you may reade in the first part of the Institutes, sect. 67. onely this may be added that neither this act, nor the statute of Marlebridge doth create new kinde of wastes, but doe give new remedies for old wastes; and what is waste, and what not, must be determined by the common law.

(3) *Home que tient per la ley d'Angleterre.*] Here tenant by the curtesie is named for two causes: 1. For that albeit the common opinion was, that an action of waste did lie against him, yet some doubted of the same, in respect of this word *tenet* in the writ, for that the tenant by the curtesie did not hold of the heire, but of the lord paramount, and after this act the writ of waste grounded thereupon doth recite this statute.

2. For that greater penalties were inflicted by this act, then were at the common law.

(4) *Ou en auter maner a terme de vie.*] If a lease be made *quam diu sola fuerit*, or *quam diu se bene gesserit*, or *quousque promotus fuerit*, &c. in all these and like cases they are in judgement of law leases for life within this act.

Upon these words there be many conclusions worthy of observation.

First, albeit the assignee of the tenant by the curtesie, or tenant in dower, is within the letter of this law, for he holdeth in some manner for life, yet no action of waste shall be brought by the heire against the assignee, but onely against the tenant by the curtesie, or tenant in dower; for in construction of statutes, the reason of the common law giveth great light, and the judges, as much as may be, follow the rule thereof.

But if the heire granteth away the reversion, and the assignee attorne, there the grauntee by this statute shall have an action of waste against the assignee, and the plaintiffe must declare upon this statute: for (as hath been said) in that case there lay no action of waste at the common law, so as in this point our act is introductory of a new law.

2. If the heire had graunted his reversion expectant upon an estate in dower or by the curtesie, the grauntee should not have had an action of waste against tenant in dower or by the curtesie at the common law, for that the privy was destroyed, therefore the grauntee in an action upon this statute doth recite the statute.

3. A lessee for his own life, or for another mans life, is within the words and meaning of this law, and in this point this act introduceth that which was not at the common law.

4. If a lease for life be made to A. the remainder for life to B. he in the reversion shall have no action of waste against the first lessee, for then the estate of him in the remainder should be destroyed, and such construction must be made to preserve the estate of an estranger, in whom there is no fault or default. But if he in the remainder for life dieth, then the waste is punishable as well before as after his death.

* 5. If a lease be made to A. for his life, the remainder to A. for the life of B. if A. doth waste, an action of waste doth lie against him, for the wrong doer hath both the states in him, and of that

20 H. 6. 1.
21 H. 6. 38.

37 H. 6. 26.

Temps E. 1.
Wast, 122.
4 E. 3. 25.
18 E. 3. 3.
30 E. 3. 16.
38 E. 3. 23.
11 H. 4. 18.
F.N.B. 56. f.

Regist. 72. lib. 3.
fol. 23. b. Wal-
kers case, li. 11.
fo. 84. Bowles
case.

Regist. 72.
11 H. 4. 3.
5 H. 7. 17.
Lib. 11. fol. 83.
Bowles case.

Marlb. cap. 23.

33 E. 3. Wast,
144. 11 E. 3.
graunt 13.
11 E. 3. receipt
118. 4 E. 3. 18.
50 E. 3. 3.
10 E. 4. 9. l.
5 E. 4. 89. Re-
gist. F.N.B. 59.
Lib. 5. fol. 76. b.
Pagets case.
8 E. 3. 26.
* 17 E. 3. 68.
39 E. 3. 25.
6 E. 3. 19.

that opinion was sir James Dier chiefe justice of the common pleas, Pasch. 18 Eliz.

6. If a lease for life be made, the remainder for years, an action of waste shall lie against the lessee, for the recovery therein shall not destroy the terme for yeares.

4 E. 3. 18.
3 E. 3. 18.
F.N.B. 59. h.

7. Fem^r lessee for life taketh husband, the husband doth waste, the wife dieth, the husband shall not be punished by this law, for the words of this act be, *home que tient, &c. pur vie*, and the husband held not for life, for he was seised but in the right of his wife, and the estate was in his wife.

46 E. 3. 32.
46. tit. Waste
Statham.
Lib. 10. fol. xv.
Southcots case,

8. An occupant is within this law, for the words of this act (as hath been said) are *home que tient*, which are more liberall words then if the statute had spoken of a lease or demise, and certain it is that the occupant holdeth for life, so it is of the lord that entreth on his villein tenant for life.

48 E. 3. 19. l. 6.
fol. 3. Le D. de
Worcesters case,
Lib. 10. fol. 98.

9. He that hath an estate * for life by conveyance at the common law, or by limitation of use, is a tenant within this statute.

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10. A lease for life is made, the remainder over in taile or in fee, he in the remainder shall by this act have an action of waste; for the words of the statute are generall.

* Hil. 16 E. 1. in
Banco Rot. 63.
Buck. & Rot. 73.
Hereford.

11. Albeit tenant in taile *apres* possibility of issue extinct doth hold but for life, and so within the letter of this law, yet is he out of the meaning thereof in respect of the inheritance which was once in him, in respect whereof his estate is by law unpunishable of waste, but his assignee shall be punished for waste by this statute.

Temps E. 1.
Wast, 126.
39 E. 3. 16.
45 E. 3. 25.
Li. 11. fol. 83.
Ewens case,
27 H. 6. Aide.
Statham.

12. It is to be observed that such remedy as the heire had against the tenant in dower, and tenant by the curtesie, &c. by the common law, such remedy had the lessor and his heires against the farmors for life or yeares by the statute of Marlebridge, which remaineth to this day.

29 E. 3. 1. b.
Doct. & Stud.
li. 2. ca. 1.
Marlb. c. 23.
l. 11. fol. 81. b.
Bowles case.
Regist. 72.

(5) *On des ans.*] See before the statute of Marlebridge, cap. 23.

16 E. 3. Wast,
100. 21 E. 3. 26.
Doct. & Stud.
fo. 66. b. F.N.B.
53. b. li. 6. fo. 37.
First part of the
Instit. sect. 67.

Tenant by statute merchant, or staple, or *elegit*, are not within this act, for albeit they have but a chattell, yet are they not tenant for yeares.

Although the words of the act be tenant for yeares in the plural number, yet tenant for a yeare, or halfe a yeare, &c. is within this act.

38 E. 3. 17.
10 E. 4. 1.
23 H. 8. Wast. Br.
3 E. 2. Waste, 3.

Executors or administrators of a terme for yeares, though they hold in *auter droit*, shall be punished for waste done in their time, but not in the time of the testator, or intestate.

Two executors be of a ward, the one doth waste, the action lieth against him onely. See more hereof hereafter, and note the diversity.

Tenant for yeares graunts his estate upon condition, the lessee doth waste, the graunttee enters for the condition broken, the action of wast is to be brought against the graunttee, and so it is in case of lessee for life.

30 E. 3. 16.

Tenant by the curtesie, or other tenant for life maketh a lease for yeares, he in the reversion confirmeth it, tenant by the curtesie dieth, an action of waste lieth against the lessee.

8 E. 3. 26.

Tenant for yeares of a moiety, third, or fourth part *pro indiviso* holdeth a terme for yeares, he is within this act; and so it is of a tenant by the curtesie, or other tenant for life of a moiety, &c. In

10 E. 3. 32.
44 E. 3. 34.
45 E. 3. 35.
9 H. 6. 11.
12 E. 4. 2.
like
21 H. 7. 40.

like manner if two be plaintiffes, and one of them is summoned, and severed, a moiety shall be recovered.

Lib. 5. fol. 12.
Foljams case.

Tenant for yeares or for life assignes over his lease for yeares, or estate for life, excepting the timber trees, and after waste is done in felling downe the trees, the action of waste is maintainable against the assignee, for as to the lessor they are not severed from the land.

Lib. 5. fol. 78.
Booths case.

Tenant for yeares, or for life assignes over his estate, and notwithstanding takes the profits, an action of waste lieth against the first lessee, and so it is of meane assignes, the action lieth against him that taketh the profits, but this is by the statute of 11 H. 6. cap. 5. for in that case the pernor of the profits did not hold the land.

33 E. 3. p. 6.
6 E. 3. 54.
34 E. 3. re-
torn 111.

Two joyntenants for yeares, or for life, one of them doth waste, this is the waste of them both, as to the place wasted, and yet the words of the act are, (*homo que tient*) but treble damages shall be recovered against him that did the waste onely.

40 E. 3. 33.
41 E. 3. 27.
43 E. 3. 15.
48 E. 3. 19.
F.N.B. 56. a.
Temps E. 1.
Waste, 126.

Tenant for yeares or for life doth waste, and after assigneth over his estate, now the words be (*homo que tient*), &c. he that holdeth for life or for yeares, and after the assignement he holdeth not the land, yet shall the action of waste be brought against him in the *tenet*, because in the eye of the law he is tenant as to the action of waste, and against him that was the wrong doer did the action accrew, which he cannot avoid by his assignement, and against him shall the treble damages be recovered and the place wasted, and so it is of the meane assignes; a just interpretation that he that did the wrong should answer the same, and this is the cause that generall nontenure is no plea in an action of waste, but speciall nontenure may be pleaded, as the granting over of his estate, before which graunt no waste was done.

40 E. 3. 33.
43 E. 3. 8.
44 E. 3. 5.

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Tr. 7 E. 1. in
Communi Ban-
co. Rot. 21.
Norff.

(6) *Ou feme que tient en dower.*] This is to be understood of all the five kindes of dowers whereof Littleton speaketh, *viz.* dower at the common law, dower by the custome, dower *ad osium ecclesiæ*, dower *ex assensu patris*, and dower *de la plus beale*, and against all these the action of waste did lie at the common law.

(7) *Et celui que serra atteint de waste.*] As it hath beene said, if one joyntenant doe the waste, both shall be attainted of the waste, &c.

In an action of waste brought against tenant by the curtesie, tenant for life, tenant for yeares, or tenant in dower, which before hath been named in this act, the entry of the plea of the tenant is *quod predictus (talis) non fecit wastum*, and yet all these by construction of law shall answer for the waste done by any stranger, for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrong doer, and recover all in damages against him, and by this meanes the losse shall light upon the wrong doer; for voluntary waste and permissive waste is all one to him that hath the inheritance. But if the waste be done by the enemies of the king, the tenant shall not answer for the waste done by them, for the tenant hath no remedy over against them. The same law it is if the waste be done by tempest, lightning, or the like, the tenant shall not answer for it. It is adjudged in 9 E. 2. that if theeves burn the house of tenant for life, without evill keeping of lessees for lives fire, the lessee

32 E. 3. Wast,
30. 19 E. 3.
ib. 30. 41 E. 3.
ibid. 81.

33 H. 6. 1.
F.N.B. 59. b.
Dier. 28 H. 8.
33. 29 H. 8. 36.
14 Eliz. 314.
Pasch. 9 E. 2. 63.
b. In libro meo,
Un brieve de
Waste. 19 E. 3.
Wast, 31.

lessee shall not be punished therefore in an action of waste; *nota* the case of fire, &c.

A. seised of land in fee acknowledgeth a statute merchant, and infeoffeth B. who letteth the same for life, the land is extended upon the statute, B. bringeth an action of waste against the lessee, he may plead this execution, &c. before which execution no waste done, for the possession of the land is lawfully taken from him by course of law, which he could not withstand, and if he should be punished for waste, he should have no remedy over.

So it is if a man make a lease for yeares, and put out the lessee, and make a lease for life, the lessee enter upon the lessee for life, and doth waste, the lessee for life shall not be punished therefore for the cause aforesaid.

If tenant in dower be of a manor, and a copiholder thereof commit waste, an action of waste lieth against tenant in dower.

If an infant be tenant by the curtesie, or lessee for life, or yeares, he shall answer for the waste done by a stranger, and have his remedy over, though some have holden the contrary, for in that case also the losse shall be upon the wrong doer; and so it is in case of a feme covert, for the privilege of infancy and coverture in this case shall not prevaile against the wrong and disherison done to him that hath the inheritance, especially when they have their remedy over, and the estate is of their owne purchase or taking. And so it is if a lease be made to the husband and wife, and the husband doth waste and dieth, if the wife agreeeth to the estate, she shall be punished for the waste done by her husband in like manner, as if a stranger had done the waste, and after the death of her husband she is in from the lessor, and if the action had been brought against the husband and wife, the writ should have been *quod fecerunt vastum*, so as it was as well the waste of the wife, as of the husband.

(8) *Perdra le chose que il aver waste.*] That is, these four tenants before named shall lose the thing which he hath wasted, but it is ever rendred *amittet locum vastatum*.

* If waste be committed in a house *sparsim* in divers severall parts, the whole house shall be recovered, although all be not wasted. In auncient time it was holden † by some, that if the hall were wasted, the whole house should be recovered, for that in those dayes the hall was the place of greatest resort, and use, in so much as the whole house was called by the name of the hall, as Dalehall, &c. but the purview of this act is, that he shall lose the thing that he hath wasted.

So it is of a wood, if waste be done *sparsim*, though all the wood be not wasted, the whole wood shall be recovered: and the reason of both these cases was, for that if waste were done *sparsim* in houses or woods, that by the construction of these words, the whole should be recovered, for that otherwise the house that was for the habitation of man, or the woods that so many wayes were for mans necessary use, could not be enjoyed, neither by him that had the inheritance, nor by the tenant without continuall trespassing the one to the other, *et boni judicis est causas litium dirimere*; but if waste were done in one part of the wood that might be conveniently divided from the rest, that part only is *locus vastatus*, and shall be recovered.

32 E. 3. Waste,
104.

Doct. & Stud.

Temps E. 1.
Waste, 128.
3 E. 3. 13. 46.
9 E. 3. 42.
11 Aff. 11.
10 E. 3. 17.
42 E. 3. 21.
46 E. 3. 25.
2 H. 4. 3. 2.
7 H. 6. 2. b.
2 H. 6. 24. b.
33 H. 6. 31.
19 E. 3. bre. 246.
10 E. 4. 18.
15 H. 3.
Waste, 133.

* Temps, E. 1.
Waste, 127.
8 E. 2. Waste,
112. 4 E. 3. 32.
15 E. 3. Judge-
ment, 134.
15 E. 3. Waste,
108. 34 H. 6. 44.
15 H. 7. 11.
† [304]
4 E. 6. Waste
Br. 136.
18 H. 8. 1.

And

And so it is of brook medow, if the tenant plough it up *sparsim* (as hath been before said.)

7 H. 3. Wast, 141.
Pl. Com. in Case
de Mines.
5 R. 2. Wast, 97.
Teps E. 1.
Wast, 128.

A tenant for life or yeares of a parke, vivary, warren, or dovehouse, if he destroy the deere, or the fish in the vivary or ponds, or the game in the warren, or the doves in the dovehouse, it is waste, and hee that hath the inheritance shall recover the park, vivary, warren, or dovehouse, and therefore the makers of this act meaning to include all kinde of wasts, used this generall word [*chose*.]

And so it is if the tenant kill so many of the deere, fish, game or doves, as there be not left sufficient for store having regard to the number that were there when his estate or interest was created or made, this is waste, and so it was holden, Pasch. 15 Eliz. in *communi banco*, et sic de similibus.

Exile and destruction of villeins by tallage and oppression is wast, and this act saith [*perdra le chose*.]

3 E. 2. Wast, 2.
9 E. 2. Wast, 2.
16 H. 3. ib. 135.
9 H. 6. 42.
22 H. 6. 10, 11.
11 H. 7. per
Fineux, 8 E. 2.
Wast, 113.
17 E. 2. ib. 118.
15 H. 3. ib. 130.
2 H. 6. 10.
F.N.B. 60. o.
Lib. 5. fol. 115.
Foliambes case.
Regist. 72.

(9) *Et ouster ceo face gree de treble de ceo que le waste serra taxe.* Concerning costs in this action sufficient hath been spoken, ca. 1.

The plaintiffe shall not recover damages for any waste done hanging the writ, and therefore the plaintiffe may have a writ of *estrepement* in this action, et sic de similibus.

Lessee for yeares committeth wast, and the years doe expire, yet shall the lessor have an action of waste for the treble damages, although he cannot recover the place wasted, and though the statute be in the conjunctive, *perdra le chose*, &c. et ouster ceo face gree, &c. for as there was at the common law two forms of actions of waste, viz. in the *tenet*, as against tenant by the curtesie, &c. and in the *tenuit* against the gardein after full age, so upon this act the like kinde of formes is framed by equall construction, viz. in the *tenet* to recover the place wasted, and treble damages, and in the *tenuit* to recover treble damages only.

46 E. 3. 25.

19 E. 2. Wast,
190. 8 H. 6. 10.
45 E. 3. 9.

8 H. 5. 3. 4 E. 3.
33. 14 H. 6. 14.
19 H. 6. 41. 66.
12 H. 4. 5.
3 H. 6. Wast,
35. 32 E. 3.
barre 262.
12 R. 2.
Wast, 99.

But this is to be understood when the terme expires by effluxion of time, as in the case of a lease for years, or when the estate determines by the act of God, as when *cesti que vie* dieth, or when the estate is ended or defeated by the act and wrong of the tenant, as when he makes a feoffment in fee, or commits any other forfeiture, and the lessor enters, yet the lessor shall have his action of waste; but when the tenant commits waste, and after surrendreth to the lessor his estate or terme, and he in the reversion agreeth therunto, he shall not have an action of waste in the *tenuit*, for he cannot by his owne act alter the forme and nature of his action from the *tenet* to the *tenuit*, and he cannot plead, *devant quel surrender nul waste fait*.

An action of waste is brought against the lessee for years, or against tenant *pur terme dauter vie*, and hanging the action the term expires, or *ce' que vie* dieth, yet the writ shall not abate, for that an action of waste (as hath been said) lieth onely for the damages in those cases, which he shall recover in that action then depending.

[305]
23 E. 3. Judg-
ment, 255.

In an action of waste against a lessee for life for waste done in three acres, the defendant claimeth fee, whereupon issue is joyned, the jury findes against the defendant that he hath but an estate for life, and enquired further of the waste, and found the waste done in one acre onely, the plaintiffe cannot have judgement for the whole

whole land, in respect of the forfeiture and treble damages, for that judgement is not according to this act, that is to say, of the place wasted, and treble damages in respect of the place wasted, wherefore he had judgement according to the statute of the one acre and treble damages.

Upon this branch it hath been received for a certain rule, that if waste be committed, and he in the reversion dieth, that the action of waste faileth, for that the heire cannot recover damages for the waste done in the life of the auncestor, and the waste was not done by the disheritance of the heire, and yet the law doth extend the action of waste favourably as much as with convenience may be, lest waste which is hurtfull to the common wealth should remaine unpunished; and therefore if two coparceners be, and they make a lease for life or yeares, and the lessee commit waste, and one of them hath issue and dieth, and after the lessee commit waste againe, albeit the writ shall say that both the waists were done to the disheritance to the aunt and neece, yet shall the action be maintained, and the judgement shall be severall, though the action be joynt, for judgement shall be given for them both for the place wasted, and the damages treble for the waste done in their owne time, and the aunt shall have a sole judgement for the whole damages for the waste done in the time of her sister by survivor, which is a leading case, and worthy of great observation.

(10) *Et en waste fait en garde.*] There is gardein in chivalry, and gardein in socage: again gardein in chivalry is twofold, gardein in *droit*, and gardein in *fait* of the graunt of the king, or of the subject; also both these are either gardeins by right, or gardeins by claime and possession without right: likewise gardein in socage is two-fold, *viz.* gardein by right, who is called *tutor proprius*, and gardein by possession and claime, who is called *tutor alienus*.

^a Against all these both a prohibition of waste, and an action of wast lie at the common law, but none of these gardeins shall be charged but for the voluntary or permissive waste, and not for the waste done by a stranger. But if there be two joyntenants of a ward, and the one doth waste, this is the waste of both, for he is no stranger, 3 E. 3. 18.

If the gardein suffereth a stranger to cut down timber trees, or to prostrate any of the houses, and according to his name of gardein doth not endeavour to keep and preserve the inheritance of the ward in his custody and keeping, nor to forbid and withstand the wrong doer, this shall be taken in law for his consent, for in this case, *qui non prohibet quod prohibere potest, assentire videtur*.^b And if such waste and destruction be done without the knowledge of the gardein, or with such number as he could not withstand, then ought the gardein to cause an assise to be brought against such wrong doers by the heire, wherein he shall recover the freehold and damages for such wrong and disherison: so note a diversity between the interest of a gardein created by law, for there in an assise the heir shall recover damages, but otherwise it is in the case of a lease for yeares, which is the lessors own act.

^c The gardein doth waste, and after assigneth over his interest, an action of waste lieth against the grantor in the *tenet*.

^d Note that the action of waste against the gardein is generally, *fecit vastum, &c. de terris, &c. quas habet vel habuit in custodia de hereditate*

8 E. 2. Wast, 110.
11 E. 2. ib. 115.
45 E. 3. 3.
20 E. 3. Quar.
Imp. 63.
35 H. 6. 23.
F.N.B. 6. r.
Kelwey, 105.

^a Glan. 1. 7.
c. 9, 10. Bract.
li. 4. fol. 28. &
316, 317.
Britton, 33, 34.
Fleta, 1. 1. c. 11.
7 H. 3. Waste,
141. 9 H. 3.
ib. 136. 10 H. 3.
ibid. 142.
20 H. 3. ibidem.
2 E. 2. ib. 1.
4 E. 2. Account.
107.
16 E. 3. Wast,
100. 13 E. 3.
Account, 77.
32 E. 3. ib. 59.
41 E. 3. ib. 35.
40 Aff. 22.
44 E. 3. 27.
5 R. 2. Waste,
97. 11 R. 2. ib.
98. 28 H. 6.
ib. 9. 10 H. 6. 7.
32 H. 6. 7.
F.N.B. 59. b.
40 Aff. 12.
Temps E. 1.
Waste, 126.
27 E. 3. 81.
F.N.B. 60. g.
26 E. 3.
Waste, 10.
c. Regist. 72.
d F.N.B. 59. c.
2 E. 2. Waste, 1.

* Mag. Chart.
c. 4. 19 E. 2. tit.
Waste, 117.
Temps E. 1.
ib. 127. See
Mich. 7 E. 1.
in communi
banco Essex.
Picots case, Hil.
8 E. 1. ibid.
Rot. 52. North
Lovets case,
48 E. 3. 10.
F.N.B. 60. c.

3 E. 2. Waste, 3.
7 E. 3. 12, 13.
43 E. 3. 88.
Regist. 72.
F.N.B. 59. e.
& 60. c. coram
rege per bre. de
errore placita
apud Dublin.
Coram Johanne,
justic. Hibern.
Pasc. 30 E. 1.

Bract. 1. 4.
fo. 316. F.N.B.
60. c.

Bract. 1. 4.
fo. 316. 38 E. 3.
7. 14 H. 4. 11,
12. 3 E. 2.
Waste, 111.
34 E. 3. ib. 146.
12 H. 4. 3.
F.N.B. 60. p.
Pl. Com. in
Stowels case.

Mich. 6 E. 1. in
banco Rot. 47.
Essex Petrus Pi-
cots case.

11 H. 4. 75.
12 E. 4. 10.
15 H. 7. 4.
Lib. 3. fol. 146.
Les Carpenters
case.

hereditate prædicta, which writ doth extend as well to the gardein in focage as in chivalry.

(11) * *Perdra le gard, et rendra al heire les damages del waste.*] So as if the heire bring his action of waste within age, the judgement by this act is, that he shall lose the whole wardship, not *locum vastatum* onely, and * yeeld to the heire single damages, if the wardship be not sufficient to satisfie the damages; see before what the judgement was at the common law.

But then it may be demanded, What if the gardein commit waste, and the heire did not, or perhaps could not bring an action of waste, being done so neare his full age, or having no notice thereof, what remedy hath the heire after his full age, for the gardein cannot lose the wardship, for his estate is ended, and it seemeth by the letter of the law that he must bring his action upon this statute within age, for the words bee [*perdra la garde.*] To this it is answered that the heire at his full age shall have an action of waste, and recover treble damages by this act, for the wardship cannot bee lost, and the wrong and disherison done to the heire ought to be fully recompenced, and the statute hath annexed treble damages to the action of waste, as if it were enacted by parliament, that an action of waste should lie against tenant in taile *apres possess.* therein treble damages should be recovered as incident or annexed by this law to the action of waste.

And wheresoever the common law gave single damages against any, this act doth give treble, unlesse there be any speciall provision made by this act. Also in an action of waste, the jurors shall have the view of the place wasted, &c. as an incident to the action of waste, for in the action at the common law the jurors should have had the view.

The law appointeth not of what value the waste shall be, neither in the case of the foure tenants first before mentioned, nor in the case of the gardein, who is to lose all for waste done in any part. Herein the rule of Bracton is good, *Vastum erit injuriosum, nisi vastum ita modicum fuerit, propter quod non fit inquisitio faciend'*; and *de minimis non curat lex*; for waste done to the value of xx. d. (which now is v. s.) the gardein lost the whole wardship.

If a feme seignioresse take husband, the tenant holding by knights service dieth his heire within age, the husband doth waste and dieth, the action of waste lieth against the wife. So if an infant be gardein in chivalry, and doth waste, an action of waste lieth against him, for he is within the letter and meaning of this law made against waste and destruction.

(12) *Si le gard' perdue ne suffist a la value des damages, avant le age de mesme le garde.*] See a notable record upon this branch in the same yeare that this statute was made.

A. hath the wardship of Blackacre and the heire of B. and Whiteacre and the heire of C. *per cause de gard*, A. doth waste in Blackacre, he shall lose but Blackacre, for that waste is done onely to the disherison of that heire; and so it is if he doth waste in Whiteacre, he shall onely lose that acre for the waste done there to the disherison of that heire.

At the common law in case of tenant by the curtesie, tenant in dower, or gardein, the heire, &c. might have entred into the houses and lands to see if waste were done, to the end that if he found any waste done, he might bring his action, and to that end might

might the heire or he in reversion send any other to that intent; now this act giving an action of waste against tenant for life, and tenant for years, doth impliedly give authority to him in the reversion either by himself, or by another to enter into the houses or lands so letten for life or years, to see if any waste be done, *quia quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud*, and therefore he in the reversion may lawfully enter, to see if any waste be done, whereupon he may ground an action upon this statute.

An action of waste lieth not upon this act in the court of ancient demesne, because that court fails of the incidents to an action of waste, *viz.* to award a writ to the sheriffe to enquire of the waste, &c.

If a tenant for life or yeares commit waste, so as he in the reversion is intituled * to his action of waste, yet if the tenant repaire the same before any action brought, he in the reversion cannot have an action of waste, but the tenant must plead it specially: but if the tenant doth repaire it after the writ brought, and before he hath day to plead, he cannot plead it in barre of the action.

Upon the construction of this act, whether in this mixt action the place wasted is the principall, or the damages, some question hath been made, and in divers respects the one is more principall then the other, for in respect of the antiquity against tenant in dower, and the tenant by the curtesie, the damages are the principall, as hath been before shewed; and therefore they shall be sometime preferred, *viz.* the plaintiffe to have execution of the damages before the place wasted. But in respect of the quality, the realty is ever preferred before the personalty, and therefore in waste, if the defendant confesse the action, the plaintiffe may have judgement of the land, and release his damages, which proveth the realty to be the principall, and an accord is no plea in an action of waste in the *tenet*, for *omne majus dignum trahit ad se minus*.

And in an action of waste there shall be summons, and severance, for the writ is *ad exheredationem*, and the action of waste is a plea real: in an action of waste brought by two in the *tenuit*, a release of the one is a barre to both, but otherwise it is in the *tenet*, for there it barreth but himselfe.

Thus have we endeavoured to expound this excellent law enacted *pro bono publico*, for preservation of buildings for the habitation of mankind, and of woods and timber, sometime one of the beautifull, and profitable ornaments of England, and generally against all waste and destruction by particular tenants, which law being very penall, and shortly and artificially penned hath beene with great wisdom and judgement expounded in our bookes, and may be a light to many other like cases. *Vide* Magna Charta, cap. 4. Marlebridge, cap. 23. W. 1. cap. 21. W. 2. cap. 14. 21. 20 E. 1. Vet. Magna Charta, 124. 28 E. 1. ca. 18. See the first part of the Institutes, sect. 67. 71. 380, 381, 382. 492. 570. 573. 574. 577. 585, 586. 666, 667; 668. 674, 675.

28 H. 6. 25.

7 H. 6. 35.

8 H. 6. 35.

22 H. 6. 18.

20 E. 3. Wail, 32.

38 Aff. p. 1.

42 E. 3. 22.

* [307]

40 E. 3. 37.

38 E. 3. 27.

13 E. 4. 15.

34 H. 6. 7. tit.

Waste, 50.

48 E. 3. 19.

per Finchd.

11 H. 7. 13.

13 H. 7. 20.

Lib. 6. fol. 41.

44. Blaks calc.

6 E. 3. 47.

9 H. 5. 15.

30 H. 6.

barre 39.

CAP. VI.

PURVIEW est ensement, que si home mourge (1), & cit plusieurs heires (2), dont lun est fits ou file (3), frere ou soer, nephew ou niece (4), & les auters sont en plus long degree, tous les heires desormes (5) eyent recorerie per brieve de mordauncestre (6).

IT is provided also, that if a man die, having many heires, of whom one is son or daughter, brother or sister, nephew or niece, and the other be of a further degree, all the heirs shall recover from henceforth by a writ of mordaunceſtor.

(Fitz. Joinder, in Act 11. 31. 34, 35, 36. 1. Inst. 164. 2.)

Braet. l. 4.
fol 254. 283.
Brit. fol. 181. b.
Fleta, lib. 5.
cap. 2.

It appeareth by our auncient authors that this act is made in affirmance of the common law, for Braetſon ſaith, *Cum ſit aſſiſa mortis antecęſſoris conjungenda cum conſanguinitate, non erit poſt recurrendum ad pręcipe de conſanguinitate, ſed ad aſſiſam mortis, quia perſona quę propinquior eſt, et facit aſſiſam, et trahit ad ſe perſonam et gradum remotiorem, ut ibi potius procedat aſſiſa, quam pręcipe, quia illud quod eſt majus remotum non trahit ad ſe quod eſt majus junctum; ſed e contrario in omni caſu, et bene poterit quęlibet iſtarum conjungi cum alia aſſione, quia quęlibet loquitur de ſeiſina ejus quam habuit die quo obiit, quod non eſt in brevi de reſſo, et quęlibet de poſſeſſione et non de proprietate.*

So as it appeareth by Braetſon that the aboveſaid rule doth not hold onely in caſe of mordaunceſtor, but in the writ of aiel and beſaſiel, which is alſo a prooſe of the common law, for this act nameth the aſſiſe of mordaunc' onely, and his opinion is approved by our books.

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Temps, E. 1.
joindre in ac-
tion, 35.

32 E. 1. ib. 34.
19 E. 2. ib. 31.
13 E. 3. ib. 29.
19 E. 3. ib. 31.
12 E. 3. ib. 11.
7 E. 3. 34.
24 E. 3. 13. 28.
48 E. 3. 14.
27 E. 3. 89.
30 E. 1. joyndre en action 36.
19 E. 2. Judge-
ment 239.

Alſo this act extends to dying ſeiſed after the ſtatute, and yet like joyning ſhall be in the writ of mordaunc', aiel and beſaſiel of dying ſeiſed afore the ſtatute, which is another prooſe of the common law. And the ſame law it is in a formedon in the deſcender, and in writs of entry *ſur diſſeiſin* to the common auncetſor, and in a *ſur cui in vita*, writs of entry *in caſu proviſo, conſimili caſu ad communem legem*, and the like, the aunt and the neece ſhall joyne at the common law.

To know what the common law was before the making of any ſtatute (whereby it may be known whether the act be introductory of a new law, or affirmatory of the old) is the very lock and key to ſet open the windowes of the ſtatute, as partly appeareth by that which hath been ſaid, and particularly in the expoſition of this act ſhall appeare.

(1) *Si home mourge.*] Hereby it appeareth that one right muſt deſcend from one auncetſor, or elſe the caſe is not within this law.

If two coparceners die ſeiſed, and a ſtranger abate, the aunt and the neece ſhall not joyne in a writ of mordaunc' but have ſeverall writs, the one a mordaunc', and the other a writ of aiel.

In

5 E. 3. 185.

In like manner if two coparceners be disseised, the one hath issue and die, the aunt and the neece shall not joyne, for they have not one right, but severall, and therefore they must have severall actions, but when they have recovered they shall hold in coparcenery.

(2) *Plusors heires.*] Divers heires either in gavelkinde by the custome, or heirs females coparceners by the common law, for this act extends to both of them.

(3) *Dont lun est fts ou fte, &c.*] By this it appears that this act extends as well to heires by the custome, as by the common law.

The aunt and the neece bring a writ of mordaunc' of the dying seised of the father, the aunt is summoned and seised, yet the neece shall proceed and recover the moiety (although she alone could never have a writ of mordaunc' of the dying seised of the grandfather) because the writ was rightly and duly commenced, and when the neece hath recovered, the aunt may enter, and enjoy that moiety with her; for the rule of the law is, that in all cases when coparceners, or joyntenants may joyn in action, and have one and the same remedy, there if one be summoned and seised, and the other sueth forth and recovers the moiety, the other may enter with her; but when they are driven to severall actions, or where their remedies are not equal, there if one recover or continue the one moiety, the other cannot enter with her, and yet when both have recovered they shall be coparceners again.

(4) *Frere ou soer, nephew ou niece.*] Here is implied the uncle and aunt being relatives, and then here be all the persons that may have an assise of mordaunc', and so there be one that may have an assise of mordaunc', it maketh no matter how remote the other is.

(5) *Deformes.*] So as this law extends to the future, and not to the time past, and yet being made in affirmance of the common law, the same law that guideth in futuro, ruleth also in præterito.

(6) *Eyent recoverie per briefe de mordaunc'.*] These words are generall, but they have a speciall intendment, for as to the damages, the aunt alone shall recover damages untill the death of her husband, and both of them damages from the death of her sister, and so it is in the writ of aiel, and besaiel, and all this is according to the course of the common law before the making of this act, see the exposition upon the first chapter of this parliament.

37 H. 6. 8.
35 H. 6. 23.

10 H. 6. 10.
19 H. 6. 45.

31 H. 6. Entry
cong. 54.
First part Inst.
sect. 696.

See the auncient
authors, ubi sup.
F.N.B. 195. c.

See cap. 1.
45 E. 3. 3.
35 H. 6. 23.

[309]

C A P. VII.

ENSEMENT si feme vende, ou
done en fee, ou a terme de vie
(2), tenement que el tient en dower (1).
Establie est, que le heire, ou auter, a
que la terre deveroit reverter (3)
apres le decease la feme, eit mainte-
nant

ALSO if a woman sell or give in
fee, or for term of life, the land
that she holdeth in dower; it is or-
dained, that the heir, or other to
whom the land ought to revert after
the death of such woman, shall have
present

A a 2

nant (4) *son recoverie per briefe den-*
tre (5) *fait de ceo en la chaucerie.*

present recovery to demand the land
by a writ of entry made thereof in the
chancery.

Customier de Norm. cap. 118. fol. 138. (Fitz. Entre, 7, 8. Bro. Ingress, 3. 1 Roll. 161. 11 H.
7. c. 20. Regist. 235.)

Regist. 237.
Mirror, ca. 5.
§ 5.
First part of the
Instit. sect. 483.

The mischief before the making of this statute was not, where a gift or feoffment was made in fee, or for terme of life by tenant in dower, for in that case he in the reversion might enter for the forfeiture, and avoid the estate: but the mischief was, that when the feoffee, or any other died seised, whereby the entry of him in the reversion was taken away, he in the reversion could have no writ of entry *ad communem legem* untill after the decease of tenant in dower, and then the warranty contained in her deed (as in those dayes all deeds of feoffment for the most part comprehended warranty, and specially when the intended to barre her heire that had the reversion) barred him in the reversion, if he were her heir, as commonly he was, and for the remedy of this mischief this statute gave the writ of entry in *casu proviso* in the life time of tenant in dower, which is implied by this word [*maintenant, &c.*] The purview of this act Fleta rendreth thus, *Est autem quoddam breve provisum de ingressu, per quod habens statum, recuperabit dotem alienatam per formam statuti, quod tale est; si mulier alienet dotem suam in feodo, vel ad terminum vite donatoris, hæres vel alius ad quem spectat reversio, statim ipso facto habeat actionem petendi dotem illam in dominico.*

Fleta, li. 5. c. 34.

22 Aff. 37. 29
Aff. 54. 3 E. 2.
entry 8. F.N.B.
207. f. 5 H. 7.
31. 14 H. 7. 13.
14. 58 H. 6. 3.
30. 14 H. 4. 28.

(1) *Fem', &c. que tient en dower.*] The tenant by the curtesie, or the lessee for life is not within the case of this statute, but he in the reversion upon their alienation shall have a writ of entry in *con-simili casu* by that excellent statute of W. 2. cap. 24. *quotiescunque evenierit in cancellaria, quod in uno casu reperitur breve, et in consimili casu cadente simili indigente remedio, &c. concordent clerici de cancellaria in brevi faciundo*, as we shall shew more at large when we come to that statute.

16 Aff. 11.

Tenant in dower taketh husband, the husband aliens in fee, he in the reversion during the husband's life may enter for the forfeiture, but he cannot have a writ of entry in *casu proviso*, for the husband hath nothing but during the coverture in the right of the wife, and our act saith, *Fem' que tient en dower vend' ou done*, so as the alienation of the husband is not within the case of the statute, and so it is in *consimili casu* when tenant for life take husband and he alien.

(2) *Done en fee ou a terme de vie.*] At this time all estates of inheritance were fee-simple, and here (for terme of life) is intended of a state for the terme of the life of a stranger, and not for the life of the tenant in dower her selfe, for such an estate wrought no wrong.

See the first part
of the Institutes,
sect. 483. 205.
F.N.B. 206. g.
Bract. fol. 323.

The words of the writ grounded upon this statute are generall, *Et quæ post dimissionem factam ad præfatum B. reverti debet*, without expressing any estate, and doth count that the tenant in dower did alien in fee, and the tenant saith that the tenant in dower did not alien in manner and forme, &c. if it be found that the tenant in dower did alien in fee taile, or for life, the demandant shall recover, as it appeareth by Littleton, for auncient formes of writs or counts cannot be altered.

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(3) *A que le terre deveroit reverter.*] If a man hath the reversion in fee, in taile, or for life, either upon his own gift or lease, or by assignation, he shall have a writ of entry upon this statute (and in like case *à consimili casu*) for the words of this act are generall (to whom the land ought to revert) and the words of the writ grounded upon this statute are, *Quam clamat esse jus et hæreditatem suam*, but yet an estate for life, as hath been said, is within this statute. And this act providing against the alienation of tenant in dower, speaketh onely of him in the reversion, because there can be no remainder limited upon her estate, otherwise it is of the writ of *consimili casu*, as we shall shew when we come to the statute of W. 2. cap. 24.

Fleta ubi supra.
31 E. 1. Entry 64.
12 E. 2. ibid. 60.
20 E. 2. bre. 149.
7 E. 3. 54.
8 E. 3. 48.
21 E. 3. 11.
F.N.B. 205. n.

And this act speaketh onely of land which lieth in livery, for the feoffment or estate for life made by tenant in dower devesteth the reversion, otherwise it is of rents, and other things that lie in graunt.

Pl. Com. Col-
thrifts case.

(4) *Eyt maintenant.*] That is, presently after the alienation made in the life of tenant in dower, which writ he could not have, as hath been said, at the common law in the life of tenant in dower.

(5) *Son recovery per brieve d'entre.*] This writ of entry goeth by the name of a writ of entry *in casu proviso*, so called, because it hath the words of the writ of entry, *ad communem legem* (mentioned by Bracton) with this addition, by force of this act, *Et quæ post dimissionem per ipsum C. (viz. tenentem in dotem) præfatus D. contra formam statuti de Gloc', de communi concilio regni nostri inde provisi ad præfatum B. reverti debet per formam ejusdem statuti ut dicit*, and of these words, *inde proviso*, it taketh his name of the writ of entry *in casu proviso*, and by these words this writ differeth from the writ of entry, *ad communem legem*, because this writ lieth during the life of tenant in dower by the reference it hath to this act, which giveth the writ *maintenant*, &c. as hath been said.

Bract. l. 4. f. 324.

Fleta ubi supra.

But the writ of entry *ad communem legem* lieth not during the life of tenant in dower, and the writ of entry *ad communem legem* doth not make mention of the death of the tenant for life, but that must be expressed in the count.

16 E. 3. bre. 661.

C A P. VIII.

PURVIEW est enſement, que les viscounts pled' en counties (1) les ples de trespas, auxy come ils soient estre pledes. Et que nul neit desormes briefes de trespasse devant justices (2), sil ne affirme per soy, que les biens emportes valent 40. s. al meins (3). Et sil se plaint de batery affirme per soy que sa plaint est veritable. Des plaies, et des maibemes, cit home briefe sicome home soleit aver (4). Et graunt est, que les defend' puissent faire attor-
neis

IT is provided also, that sheriffs shall plead pleas of trespasss in their counties, as they have been accustomed to be pleaded. And that none from thenceforth shall have writs of trespasss before justices, unless he swear by his faith, that the goods taken away were worth forty shillings at the least. And if he complain of beating, he shall answer by his faith, that his plaint is true. Touching wounds and maims, a man shall have - his

A a 3

*neies en tiel plees, ou appell' ne gist (5) mie, issint que sils soient attaints du trespas en leur absence, soit maund' al vise', que ils soient prises (6), et eient adonques * la peine, que ils averont sils ussient estre presents quant le jugement fuit rendus. Et si les plaintiffes desormes en tiel trespas se facent essoine apres la primer apparans, soit jour done jesques a la venue des justices erranis (7), et les def. en dementires soient en peace en tielx plees, et en auters plees, ou attachments, et distres gisent (8). Si le defend' se face essoine del service le roy (9), et ne port son garrant (10) au jour que done luy est per son essoine: establie est que il rendra al plainiife les damages de la tourne de xx. s. ou de pluis, selonque le discretion des justices (11), et jademains soit en le greve mercy le roy.*

his writ as before hath been used; and it is agreed, that the defendants in such pleas may make their attornies, where appeal lieth not; so that if they be attained being absent, then the sheriff shall be commanded to take them, and shall have like pain as they should have had, if they had been present at the judgement given. And if the plaintiffs from henceforth in such trespasses cause themselves to be essoined after the first appearance, day shall be given them unto the coming of the justices in eyre, and the defendants in the mean time shall be in peace. In such pleas and other, whereas attachments and distresses do lie, if the defendant essoin himself of the king's service, and do not bring his warrant at the day given him by the essoin, he shall recompense the plaintiff damages for his journey twenty shillings, or more, after the discretion of the justices, and shall be grievously amerced unto the king,

(Fitz. Brief. 550. 14 H. 8. f. 15. Bro. Attorn. 64. 74. 78. 82. 88. Fitz. Essoin, 16, 17. 39. 41. 79. 116. 118. 198. Cro. El. 96. 43 El. c. 6. 21 Jac. 1. c. 16. Keilw. 106. b.)

This act is divided into two branches.

The first branch is in affirmance of the common law.

The second branch concerning the affidavit, this is new, and made in favour of the county court, but experience taught, that this course was so full of danger and trouble, that it was forborne, and the defendant left to take such exceptions as the common law gave him.

(1) *En countie courts.*] This is put for an example, for the hundred court, and the court baron being no courts of record are also within this law.

Regist. fo. 111.
F.N.B. 47. a.
239. d.

(2) *Briefes de trespas devant justices.*] Writs of trespassse are here put but for an example, for debt, detinue, covenant and the like: but if the trespassse be *vi et armis*, where the king upon the conviction of the defendant shall have a fine, there the sheriffe in his county cannot hold plea of it, for no court can assesse a fine but a court of record, because a *capias* to take the body is incident to it: for it is a rule in law, *Quod placita de transgressionem contra pacem regis in regno Angliæ vi et armis factis secundum legem et consuetudinem Angliæ sine brevi regis placitari non debent.*

Regist. 11.
F.N.B. 47.

Regist. 11.
F.N.B. 47.

Neither shall he hold plea of trespassse for taking away of charters concerning inheritance or free-hold, for it is a maxime in law, *Quod placita concernent' chart', seu script' liberum tenementum tangentia in ali-*
quibus

quibus curiis quæ recordum non habent secundum legem et consuetudinem regni Angliæ sine brevi regis placitari non debent.

(3) *Vailent 40. s. al meyns.*] For as the inferiour courts which are not of record regularly cannot hold plea of debt, &c. or damages, but under 40 s. so the superior courts that are of record cannot hold plea of debt, &c. or damages regularly, unless the summe amount to 40 s. or above. Now the ounce of silver was at the time of making of this act but 20 d. and now it is above thrice so much; for the wisdom of the common law was, that men should not be troubled for suits of small value in the kings courts, but that they should be heard and determined in the country with small charge, and little or no travell or losse of time, for it was then accounted against the dignity and institution of those high courts, to hold plea of small or trifling causes, *Ne dignitas curiarum illarum vilesceret, et ne materiam superaret opus*; otherwise the law that was instituted for the quiet of man, and for his defence, might be abused to his charge, vexation, and offence.

Now as the superior courts ought not to inroach upon the inferiour, so the inferiour courts ought not to defraud the superior courts of those causes that belong to them. For example, if in the county court, or other inferiour courts, they shall divide a debt of xx. l. into severall pleints under 40 s. in this case the defendant may plead the same to the jurisdiction of the court, or may have a prohibition to stay that indirect suit, for as an ancient record saith, *Contra jus commune est, petere integrum debitum excedens summam 40 s. per diversas querelas, per parcelas, scilicet, 39 s. 11 d. ob. q.*

The maxime of the common law is, *Quod placita de catallis, debitis, &c. quæ summam 40 s. attingunt, vel eam excedunt, secundum legem et consuetudinem Angliæ sine brevi regis placitari non debent.*

And these words, *sine brevi regis* are materiall words, for by the kings writ the sheriffe in the county court may hold plea of goods, debts, &c. above the value of 40 s. and by force of the kings writ of justicies, he may hold plea of an obligation of what summe soever, for example of 1000 marks, the which writ is in nature of a commission to the sheriffe to hold plea of debt above 40 s. the words of which writ are, *Rex vicecom' salutem: Præcipimus tibi, quod justicies A. quod juste et sine dilatione reddat B. mille marcas, quas ei debet, ut dicit, &c. ne amplius inde clamorem audiamus pro defectu justiciæ.* By force of which writ he may hold plea of the same, and the proces therein is attachment by his goods, &c. but no capias, and although the power of the court by this writ is in this particular enlarged, and the words of the writ to the sheriffe are, *Quod justicies, &c.* yet is not the jurisdiction of the court as concerning the judicature thereof, altered, for those words of the writ do not, nor can make the sheriffe judge of that court in that particular case, for that were to alter the jurisdiction and judicature of the court, whereof by the common law the suitors be judges, which cannot be altered but by act of parliament: the plaintiffe may remove this plea without cause shewed, but the defendant cannot without shewing of cause.

Also by force of a justicies to the sheriffe, he may hold plea of a trespassse *vi et armis.* Vide Register, and F. N. B. divers formes of writs of justicies in many actions.

Regist. 146.

F.N.B. 46.

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Pasch. 20 E. 3.

Coram Rege.

Rot. 164. Cestr.

Regist. 146.

F.N.B. 46.

Brit. ca. 28. fo.

61.

3 H. 6. 54. 55.

Glanv. l. 12. c.

18.

Brit. fo. 53, 54.

Fleta, l. 2. c. 55.

Brac. l. 3. f. 105.

b. F.N.B. here-

afterwards.

Bract. ubi supra.

Brit. ubi supra.

8 E. 4. 5. 14 H.

8. 15. F.N.B.

86. b. c. d. 85. g.
86. a. 7. a. 117.
a. c. 119. 123.
125. 128. 132.
135. 137. 139.
148. 161. 184.
151. 152.

The sheriffe may also hold plea in a replevin of goods and chattels above the value of 40 s. for if it be by writ, the words of the writ be, *Rex vicecom', &c. Præcipimus tibi quod iuste, et sine dilatione replegiari facias B. averia sua, or bona et catalla sua, quæ D. cepit et iniuste detinet, ut dicit, &c. ne amplius inde clamorem audiamus pro defectu iusticiæ.* By force of which writ, which is in nature of a commission, the sheriffe may deliver the beasts, or goods and chattels of what value soever. And if the replevin be by plaint in the county court, the sheriffe by the statute of Marlebridge may hold plea of what value soever.

The like writs in the nature of a commission directed to sheriffes are the admeasurement of pasture, recaption, *nativo habendo*, and many others.

Brit. c. 28. f. 61.
19 H. 6. 8. b.

The said words, *vailent 40 s. al meus*, have received this construction, that the same must so appeare to be of value in the plaintiffes count, for it is not sufficient that it appeares by verdict that the summe is under 40 s. For example, if the plaintiffe count in trespassse, debt, detinew, covenant, &c. to the damage of 40 s. and the jury finde the damages under 40 s. yet the plaintiffe shall have no judgement, albeit in truth the cause *de jure* belonged to the inferior courts.

This shall suffice for the exposition of this branch of our act, the residue shall be referred to the treatise concerning the jurisdiction of courts whereunto this matter properly belongeth.

(4) *Des playes et des mayhemz eyt home. brieve sicome home seiloit aver.*] This is the third branch of this act, and hereby it appeareth that the county court hath no jurisdiction to hold plea *de plagis et mayhemis*, of wounds and maihemz, but those pleas must be determined in the kings higher courts, but of battery (without wounding or maiheming) this act proveth that the county court hath jurisdiction.

What in law is adjudged a maiheme, and whereof the word is derived, you shall reade in the first part of the Institutes, sect. 194.

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(5) *Et graunt est, que les defend' puissent faire attornies en tiels plees, ou lappeale ne gist, &c.*] See before W. 1. cap. 41. Merton cap. 10. W. 2. cap.

Regist. 19. b.
this extends to
justices in eyre,

Some have thought that this clause concerning making of attourneys is generall, and extendeth to all actions reall and personall, but it seemeth to be particular, for in ancient manuscripts the former branch, *viz. des playes et des mayhemz, &c.* is a distinct chapter by itselfe, and this branch is parcell of that chapter, so as these words, *en tiels plees*, such pleas must be referred to pleas of trespassse, battery, wounding, and mayheming, unlesse it be in appeal of mayheme, which being *seleuce maihemavit*, the defendant should not make an attorney no more then he could at the common law: and the words subsequent (*issint que sils soient atteint de trespassse en leur absence*) prove that this branch is not generall, but referred to the clause next precedent: and note that neither the plaintiffe nor defendant at the common law could make an attourney in any appeale untill triall, acquittall, judgement, &c.

But it may be objected that against this exposition the booke in 21 H. 7. is, *Que home ferra attorney in appeale de maiheme, quod vide de common course* 16 H. 7. in Caworths case; which case is uncertainly reported, for it appeareth not whether it be meant of the plaintiffe or

6 H. 7. 1.

3 H. 7. cap. 1.

40 Aff. 17.
40 E. 3. 42.
11 H. 4. 11.
8 E. 4. 3.

21 H. 7. 39. b.

or defendant; but of the defendant it cannot be intended, for that should be against our books, the true interpreters of this act. And of the plaintiffe (it seemeth it was intended) he cannot be by attourney, and that was Caworths case mentioned in the report of 21 H. 7. the record whereof being found out is against the report thereof; which very point came in question in my time in the kings bench in an appeale of mayheme brought by Hudson against Marwood, the plaintiffe appeared by attourney, and declared against the defendant, the defendant prayed that the plaintiffe might be demanded, for that he could not appeare by attourney, and if the plaintiffe appeared not, that he might be nonsuited; against which the counsell of the plaintiffe objected, that the plaintiffe in an appeale of mayheme might appeare by attourney, for that it might be, that he was so wounded as he could not appeare, and for authority cited the said booke in 21 H. 7. whereunto answer was made by the counsell of the defendant, and resolved by the whole court, that the plaintiffe could not appeare by attourney, for the defendant may demand *oyer* of the mayhem, &c. which shall be peremptory to him being a tryall of the mayheme, which is a triall which the law giveth him.

8 E. 3. Attourney 93. 2 R. 3. 13. 6 H. 7. 1. F. N. B. 26, 27. Vet. N. B. 19, 20. M. 25 & 26 Eliz. Coram Rege Rot,

And albeit it may be hard and difficult in some particular case in respect of the grievousnesse of the mayheme for the plaintiffe to appeare in person, as it was in 16 H. 7. where the mayheme was hainous and horrible, the legges of the plaintiffe being broken over a threshold, yet that must not change the law, nor take from the defendant his just defence and triall, for so upon the like surmise the defendant might be barred thereof in all cases.

And Sir Christopher Wray chiefe justice said that the record of Caworths case had been seen, and that the record thereof was against the report, and thereupon the plaintiffe was called, and by the rule of the court was non-suit, and I was of counsell in this case, which I have the rather reported the more at large, for that no man should bee deceived by the said report of 21 H. 7.

(6) *Soit maund al vife que ils sent prises.*] This is the fourth branch of this act.

Albeit this statute speaketh onely of the execution of the body, yet might he have had at the making of this act a *feri fac*: and afterwards by the statute of W. 2. cap. 45. he may have an *elegit*, for this branch being in the affirmative doth not restrain the plaintiffe to take any other remedy.

(7) *Si les plaintifes deforms en tiel trespass, &c. se facent effoine, &c. soit jour done tanq; al venu des justices errants, &c.*] This is the fift branch of this act, and is to be intended of an effoine *de service le roy*, and extendeth to actions of trespasse, and not actions of debt. Touching common effoines, which were used for delay onely, former provisions had been made. By matter subsequent this branch is become of no use, for seeing the authority of justices in eyre is ceased, when the plaintiffe is effoined of the service of the king, the court cannot give day before the justices in eyre, and therefore it remaineth, as it was before the making of this act.

[314]
45 E. 3. 10. b. Marleb. c. 13. 19. W. 1. c. 41, 42, 43, &c.

Note that when the demandant or plaintiffe is effoined *de service le roy*, and at the day brings not in his warrant, this shall be adjudged a non-suit.

Tr. 18 E. 3. 21 E. 3. 37. b.

(8) En

27 E. 3. 81.
12 H. 4. 14.
per Skrene.

Marl. c. 19.
12 H. 4. 14.
2 E. 4. 16. l.
5 E. 4. 70.

34 H. 6. 1.
35 H. 6. 2.

(8) *En tiels pleas et en auters pleas, ou attachments et distres gisent.*] That is to say, in personall actions, where the process is by attachment and distresse. This is the sixt branch of this act.

(9) *Essoine de service le roy.*] Herein the delay is great, viz. for a yeare and a day, therefore he that cast the essoine must appeare in person in court to the end he may be sworne, &c. and that day may be given to bring in the warrant for the essoine.

(10) *Et ne port son garrant.*] A warrant under the privy seale is not sufficient, but it must be by writ under the great seale directed to the justices; also the warrant must testifie that he is in the kings service, &c. which commonly is upon certificate made to the lord chancellor by the captaine of the host under whom he serves.

And this is the first act, that concerned the essoine *de service le roy*.

(11) *Il rendra al plaintife les damages de la journey de 20 s. ou de plus solongue le discretion les justices.*] The statute speaketh where there is one defendant, &c. he shall pay 20 s. and if there be divers defendants, and they are essoined *de service le roy*, and at the day bring in no warrant, every one of them shall pay 20 s. for they are in law several essoins.

And the court by their discretion may by force of the act increase it to a greater summe, as sometime to 40 s. &c.

And albeit this branch doth not by expresse words determine what shall be further done, yet if the essoine were cast after issue in a personall action, and seeing the essoine for want of a warrant is turned to a default, it followeth that by the common law the enquest shall be awarded by default, and therefore in that case he shall have the * 20 s. *pur la journey* by the statute, and by the enquest recover his damages and costs by the common law; for statutes made for the ousting of delays are ever construed liberally and beneficially.

In a reall action if an essoine be cast for the tenant *de service le roy*, and no warrant is brought in at the day, he shall not pay the * 20 s. &c. for this act extends not to reall actions; but a *petit cape*, or a ground *cape* shall lie as upon a default, as the case shall require.

4 E. 2. essoine
79. 28 E. 3. 98.
Kelwey 106 &
107.

29 E. 3. 13. 36.

29 E. 3. 36.
21 E. 3. 37.

* Hil. 16 E. 1. in
Banco 75. Buck.
& Rot. 73.
Hereford.

* Hil. 16 E. 1.
ubi supra. 20. s.
in Action de
Waste vers Te-
nant pur vie.

* [315]

C A P. IX.

PURVIEW est ensement, que nul brieve ne issent desormes de le chauncerie pur mort de home, denquirer si home occist auter per misadventure, ou soy defend, ou en auter maner * sans felony (1), mes celuy soit en prison j'esque al venue des justices errants, ou assigne a gaole deliverie (2), et se mist en pais devant eux de bien et male. Et si soit trouve per pais que il le fist soy defend,

ou

THE king commandeth that no writ shall be granted out of the chancery for the death of a man to enquire whether a man did kill another by misfortune, or in his own defence, or in other manner without felony; but he shall be put in prison until the coming of the justices in eyre, or justices assigned to the gaol-delivery, and shall put himself upon the

ou per misadventure (3), donques fra les justices assavoir au roy (4), et le roy luy en fra sa grace, si luy pleist (5.) W. 1. cap. 11. Purview est ensement, que nul appell' soit abatue (7) ci legierment come avant ad este (6), mes si lappellour (8) counte le fait (9), lan (10), le jour (11), le heure (12), le temps le roy (13), et la ville (14), ou le fait fust fait, et de quel arme il fust occise (15), se estoia la appell', et jammes ne soit lappell' abatus per default de fresh suit (16) puis que home sue dedeins lan et le jour (17) apres le fait (18).

the country before them for good and evil: in case it be found by the country, that he did it in his defence, or by misfortune, then by the report of the justices to the king, the king shall take him to his grace, if it please him. It is provided also, that no appeal shall be abated so soon as they have been heretofore; but if the appellant declare the deed, the year, the day, the hour, the time of the king, and the town where the deed was done, and with what weapon he was slain, the appeal shall stand in effect, and shall not be abated for default of fresh suit, if the party shall sue within the year and the day after the deed done.

(Kel. fo. 53. 108. Woods Inst. 628. 2 Ed. 3. c. 2. 1 Bulst. 80. Regist. 134. 300. 14 Ed. 3. stat. 1. c. 15.)

Before the making of this statute, for that men were detained long in prison before they were called to answer, which was ever odious in law, writs *de odio et atia* issued out of the chancery for their relief (as it appeared before in the exposition upon the statute of *Magna Charta*) specially where the fact was either by misadventure, or *se defendendo*; and therefore this act restraining those writs, doth prescribe a course for their speedy calling to answer in those two cases. But now the writ *de odio et atia* is revived by the statute of 42 E. 3. cap. 1. as it appears in the exposition upon the six and twentieth chapter of *Magna Charta*.

See the Mirror, cap. 5. § 5. Magn. Chart. ca. 26. 29. See W. 2 ca. 29. Regist. 134.

And where the statute of Marlbridge had determined, that killing of a man by misadventure should not be any offence for the which the delinquent should dye, this statute maketh the killing of a man *se defend'* in the same degree, where by the common law he should have dyed for it.

Marlb. ca. 26.

21 E. 1. 17. b.

Lastly, where the statute of Marlbridge took an order for the parties speedy delivery out of prison in case of misadventure, this act provideth for the same both in case of misadventure, and of *se defendendo*.

(1) *Per misadventure ou soy defendant, ou en auter maner sans felony.*] Of this matter somewhat hath been said in the exposition upon the statute of Marlbridge: an indictment or a verdict that A. killed B. *se defendendo* is not good, but the special matter must be set down, to the end the court may adjudge it to be upon inevitable necessity; whereof you shall read a notable record in the parliament rolls of 3 R. 2. John Imperials case; note the words here, *Sans felony, vide Marlbridge ubi supra*, and in our books it is said to be no felony; and the reason is, because neither of them is done *felles animo*.

Marlbr. ca. 25. 43 Ass. p. 3. 3 E. 3. Coron. 302. 354. 15 E. 3. ibid. 116. 2 H. 4. 18. 11 H. 7. 23. Fleta, lib. 1. cap. 31. Rot. Parliam. 3. R. 2. nu. 18. John Imperials case.

If a man kill another in his own defence, if he escape, &c. the town shall be amerced, as an ancient mark of the common law, that made it felony.

(2) *Soit*

Magn. Chart.
ca. 26. & 29.

(2) *Soit en prison jefque al venue des justices errants ou assign' a gaole deliverie.*] Hereby it appeareth what expedition ought to be used for avoiding of long imprisonment, viz. untill the next coming of the justices; see for this *Magna Charta*.

And here it is to be observed, that the law of England is a law of mercie, *Lex Angliæ est lex misericordiæ*, for three causes:

First that the innocent shall not be worn and wasted by long imprisonment, but (as hereby, and by the statute of *Magna Charta* appeareth) speedily come to his triall.

* *Regula.*

[316.]
Bract. lib. 3.
fol. 137. a.
Brit. fo. 17. b.
Fleta, li. 1. c. 31.

Secondly, that prisoners for criminall causes, when they are brought to their triall, be humanely dealt withall; for * *Severos quidem facit justitia, inhumanos non facit*. And therefore it is said, *Cum autem captus coram justiciariis producendus fuerit, produci non debet ligatis manibus (quamvis aliquando, compedibus propter periculum evasione) et hoc ideo, ne videatur coactus ad aliquam purgationem suscipiendam*. And Fleta saith, *Cum autem capti in judicio produci debeant, non producantur armati, sed ut judicium recepturi, nec ligati, ne videantur respondere coacti*.

Thirdly, the judge ought to exhort him to answer without fear, and that justice shall be duly administred to him.

It is to be observed, that justices of gaole delivery may take an indictment of killing of a man *se defend'*, because their authority is generall, but justices of peace cannot take such an indictment, because their commission is limited, and it is taken not to be within their commission.

(3) *Et si soit trouve per pais que il soy fist soy defendend' ou per misadventure, &c.*] This may be two wayes, either when he is indicted of murther or homicide, and the jury finde it *se defendendo*, or when he is specially indicted, that he killed a man *se defendendo*, whereunto (for safeguard of his goods) he may plead not-guilty; and if he be found guilty *se defendendo*, he forfeiteth his goods, if not guilty, he saveth them.

37 H. 8. Appeal.
B. 122. 26 Aff.
32. 29 Aff. 23.
Stamf. Pl. Cor.
15. Pl. Com.
101. 25 E. 3. 42.
29 E. 3. 94.

Here is implied a maxime of the common law, that the life of a man is of so precious regard in law, that the death of a man cannot be justified, as in this case the defendant in the appeal cannot justify the death *se defendendo*, but must plead not-guilty, and as our act speaketh, *Si soit trouve per pais, &c.* the jury may finde *veritatem facti*, the truth of the fact.

And herein note a diversity between an appeal of death, and an appeal of mayhem; for in appeal of mayhem, if the defendant plead not-guilty, he cannot give in evidence that it was *se defendendo*, for that he ought to have pleaded it by way of justification in barre of the action.

19 H. 6. 31. 21
H. 6. 27. 41 Aff.
21. 9 E. 4. 28.
22 H. 6. 48.

There is also another diversity between an appeal of mayhem, or an action of trespassse for wounding, or mannas of life and member; and an action of trespassse of assault and battery for a man in defence, or for the preservation of his possession of lands or goods; for in that case he may justify an assault and battery; but he cannot justify either mayheming, or wounding, or mannas of life and member: and so note a diversity between the defence of his person, and the defence of his possession or goods.

3 E. 3. Coron.
286. See Marlbr.
cap. 25.

If a man be indicted before the coroner of the death of a man, *se defendendo*, and that he fled for the same, he shall forfeit his goods, which savoureth of the common law.

No

No man can be accessory to one that killeth another *se defendendo*. 15 E. 3. Coron. 116.

If a man be indicted for killing of a man by misadventure, or *se defendendo*, and is out-lawed thereupon, he shall forfeit no lands, but goods and chattels onely.

(4) *Ferra les justices avoir au roy, et le roy luy ferra grace si luy pleist.*] To the king, that is, in the court of chancery the pleas whereof be *coram domino rege in cancellaria*; and there the lord chancellor, upon the record certified to him in the chancery by force of a writ of *certiorari*, shall of course by force of this act grant him his pardon without speaking hereof to the king, for that speaking is intended judicially in court, as hath been said: and note this clause is generall, and extendeth as well to an appeal, as to an indictment; and therefore if a man be appealed of murder, and it is found that he did it *se defendendo*, or by misadventure, the king is to pardon it, for the offender cannot be put to death, which is the end of his suit, and an appeal lyeth not for such a killing; otherwise it is where the appellee is to have judgement of death, for there the king cannot pardon it.

(5) *Ferra grace si luy pleist.*] Are but words of reverence to the king, for the king is obliged *ex merito justicie*, to grant the pardon, albeit some opinion is to the contrary; otherwise the lord chancellor could not do it without warrant from the king.

(6) *Purview est ensement que nul appeale soit abatu cy ligerment come avant ad estre.*] The mischief before this branch of this act, was, that there were so many exceptions to abate the appeal, especially being ever allowed learned counsell to defend them; and the mischief was the greater, for that the appeal being once abated, never any other appeal (in favour of life) could be brought afterward.

At the common law, these exceptions were allowed to the plaintiff in the appeal of death:

1. That the plaintiff was not present at the mortall blow given, or felony done; for Glanville saith, *Ita ut de morte loquatur sub visis sui testimonio mulier auditur accusare aliquem de morte viri sui si de visu loquatur*. And Bracton saith, *In omni vero casu criminali, que sub se continet feloniam, in appello debet fieri mentio de anno, de loco, de die, de hora, loqui etiam oportet de visu et auditu*. And the conclusion of the writ of appeal then was, *Offert se disrationare, &c. sicut ille, seu illa, qui vel que presens fuit, et hoc vidit*.

And in another place he saith, *Non autem habet appellum femina, nisi de morte viri sui inter brachia sua interfecit, &c.* And Britton saith, *Des femis velons nous que nul ne puisse appeale de felony de mort de home, forsque de mort son baron tue deins lan et jour enter ses braches*.

These words, *infra brachia*, have this signification, that she must not onely be his wife *de jure*, but also *de facto*, that is, in possession; for the wife in possession without lawfull matrimony shall not have the appeal, but she must be his wife both in right and in possession without elopement from her husband, &c. or divorce, &c. Many other exceptions were before this act, as appeareth by our ancient authors, to be taken, and another manner of count made before this act, now this act hath retained all that was certain, and rejected the rest, as hereafter shall appear.

3 E. 3. Coron. 261. 44 E. 3. 44. 2 H. 4. 18. Stamf. Pl. Cor. fol. 16.

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3 E. 3. Coron. 361. ibid. 354. 29 E. 3. 42. 44 E. 3. 44. Stamf. Pl. Cor. 16. b. Kelwey 108.

Brit. fo. 40. b.

Glanv. lib. ult. ca. 3, 4, 5, &c. Bract. li. 3. fol. 138, &c.

Lib. 3. fol. 125. Brit. ubi supra.

Mirror, c. 2. § 7. 7 E. 4. 15. 14 E. 4. 7. 22 E. 4. 39. 50 E. 3. 15. 28 E. 3. 91. 27 Ass. 3. Ubi supra.

If the writ of appeal doth comprehend the speciall matter, *viz.* that the husband or ancestor was slain *se defendendo*, or by misadventure, the writ of his own shewing shall abate; for an appeal, as hath been said, lyeth not of such a killing, because the end of the appeal of death is, that the appellee may have judgement of death, *viz.* death for death.

See 1. part of the
Instit. sect. 500,
501. Brit. f. 45,
46. 22 Aff. p. 97.
7 H. 4. 38.
Stamf. Pl. Cor.
62.

(7) *Purview est que nul appeale soit abatu, &c.*] This clause, if it be taken by it self, is generall, and literally, as some hath taken it, extendeth to all appeals, as of death, robbery, rape, felony, mayhem, &c. but *ex antecedentibus et consequentibus fit optima interpretatio*, and all the antecedent clauses do concern the death of man; nay in this very sentence these words are contained, *et de quel arme il fuit occise*, which manifestly do prove that this act is onely intended of the appeal of the death of man. And therefore the appeals of robbery, rape, and of other felony and mayhem are not within this act; for the mischief was, as hath been said, in the case of the death of man.

See the statute
of 4 E. 1. de offic.
coronatoris.

(8) *Lappellour counte le fait, lan, le jour, le heure, le temps le roy, et la ville ou le fait fuist fait, et de quel arme il fuit occise.*] By this act the count of the appellant must comprehend these seven things: 1. the fact, 2. the yeer, 3. the day, 4. the hour, 5. the time of the king, 6. the town where the fact was done, and lastly, with what weapon.

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Brit. fo. 7. li. 5.
fo. 120. 122.
Longs case.
See hereafter
Heydons case.

(9) *Le fait.*] The fact: herein must be set forth, first, whether it was by wound, or without wound; if by wound, 4. things are necessary to be rehearsed in the setting out of the fact, besides the circumstances mentioned in the act, *viz.* 1. In what part of the body the wound was: 2. of what length and depth the wound was, where the wound is of such a quality, so as it may appear to the court that the wound was mortal; but if his arm were cut off, or the like, there the length or depth cannot be shewed: 3. that the party wounded dyed of that wound; and lastly, that it may appear that he dyed of that wound within the yeer and day after the giving of the wound; if without wound, either by weapon or without; if by weapon, as by a blow or bruising, or by putting up a hot iron in the fundament or the like, then as many of the circumstances before mentioned in the declaration of the fact as do agree therewith, and the rest of the circumstances required by the act are to be set forth: if without weapon, as by poysoning, drowning, burning, suffocating, strangling, or the like, the manner of the fact must be set forth, and so many of the circumstances required by the act as agree therewith, namely, all the circumstances, saving with what weapon the felony was done, because no weapon was used in committing of this felony: but notwithstanding, this act extendeth to all homicides, though they were not done with any weapon.

Braet. li. 5. fo.
359.

(10) *Lan.*] That is, the yeer of the reign of the king.

(11) *Le jour.*] The day here is taken for the naturall day, comprehending both the solare day, and the night also, containing 24 hours, and therefore if it be done in the night, it is said, *In nocte ejusdem diei.*

1. lib. 4. f. 41, 42.
Heydons case.
22 E. 3. Coron.
244. 11 H. 4.
12. Pl. Com.
401.

If a man be feloniously stricken the 10 day of December, &c. whereof he dyed the 10 day of January, he cannot allege the killing the 10 day of December when the stroke was, but he may allege the killing to be the day that he dyed; but the surest conclusion is; and so he killed him in manner and form aforesaid:
for

for though to some purpose the death hath relation to the blow, yet this relation being a fiction in law maketh not the felony to be then committed.

(12) *Le heure.*] *Hora constat ex 40 momentis.* The hour, as for example to say, 10 *die Decembris*, viz. *in hora decima in nocte ejusdem diei.*

There are divers diversities between the alleaging of the hour, and the day, or yeer; 1. In the count upon the appeal one may say, *circa horam 10 ante meridiem*, &c. or, *inter horam decimam et undecimam ante meridiem*; but the like cannot be done either of day, yeer, or part of the body: as the fact cannot be alleaged to be done *circa 10 diem Decembris*, &c. or, *inter decimum et 11 diem Decembris*, or *circa annum sextum domini regis nunc*, or *inter sextum et septimum dicti domini regis nunc*, or alleage the wound to be given *circa* or *circiter peñus*: and the reason of this diversity is, that it is more difficult to alleage the true hour, then the true day or yeer; and yet the plaintiffe in the appeal is not bound to prove in evidence, neither the precise hour, nor the very day that he alleageth in his count: another diversity is between the appeal and the indictment, for in the indictment the hour needs not to be alleaged.

And although the day be alleaged, yet if the jury finde him guilty at another day, the verdict is good, but then in the verdict it is good to set down on what day it was done, in respect of the relation of the felony; and the same law is in the case of an indictment.

At the sessions of the peace holden for the county of Norff. one Syer was indicted of burglary, 1 *Augusti*, 31 Eliz. and upon not guilty pleaded, it fell out in evidence that the burglary was done, 1 *die Septembris in eodem anno*, so as *primo Augusti* there was no burglary done, and thereupon he was found not guilty, and afterwards he was indicted againe 1 *Septembris*, &c. and it was resolved by Wray and Periam justices of assise, and by the greatest part of the judges, that he ought not to be tried again, for he mought have been found guilty upon the first indictment, for the day is not materiall; but it is necessary for the jury in that case to set down the day, and so in case of appeale.

(13) *Le temps le roy.*] The yeare being already named, it might seem that the time of the king, which is the year of the raigne of the king, is needlesse, but it is here againe added, to the end, that not onely the yeare shall be alleaged wherein the blow, &c. was given, but also the yeare when the death ensued thereupon, to the end that it may appeare, that he died of that blow, &c. within the yeare and day; and whensoever the yeare of the king ought to be alleaged, it draweth with it time and place, that is, the day and time, when and where the death ensued.

(14) *La ville.*] This must be understood, if the murder or homicide, were done in a town, but if it were done in a place knowne out of any towne, then may it be alleaged in that place knowne in such a county.

And so in a city it may be alleaged in a parish, &c. because such a parish is in lieu of a towne.

But in the country if a parish contain divers towns, the murder or homicide cannot be alleaged in such a parish, for that this statute requireth, that the fact be alleaged in a town.

(15) *Et*

Braet. ubi supra.
Heydons case,
ubi supra.
Lib. 9. fol. 62.
Seign' Zanchars
case.

Pasch. 32 Eliz.
resolved by the
justices.

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Vide Machallis
case here follow-
ing, and Hey-
dons case, and
Longs case ubi
supra.

Lib. fo. Ma-
challis case.

(15) *Et de quel arme fuit occise.*] With what weapon the wound was given: and albeit one certaine weapon must be alledged in the count, yet upon the evidence, if it be proved that the wound were given with any other weapon, the offender shall be found guilty; as if it be alledged in the indictment that the wound was given with a dagger, and it is proved in evidence, that it was given with a sword, rapier, hooke, hatchet, bill, or any like weapon with which a wound may be made; for it were unreasonable to drive the plaintiffe in the appeale to prove the selfe same particular weapons whereof many times he cannot have notice; but upon such a count, or an indictment in evidence it cannot be proved, that the party was poysoned, or drowied, or burnt, suffocated or strangled, or the like, where no weapon at all was used; for that evidence doth not maintain the count in the appeale or the indictment, because it is murder or homicide of another kinde, and not under the same *classis* that is alledged in the count or indictment, and thereof the plaintiffe by such as viewed the body may have notice.

And albeit this statute requireth, that it be alledged in the count of the appeale, with what weapon he was killed, it is to be understood in case where he is killed with a weapon, for albeit (as hath been said) there was no weapon at all, as in case of poysoning, drowning, &c. yet doth the appeale lie for such a murder or homicide; and the weapon is in this act mentioned for example.

(16) *Pur default de fresh sute.*] At the common law if the plaintiffe in the appeale of death had not made fresh sute, he should not have maintained his appeale: for fresh sute *recens insecutio*, that is, a speedy and continuall pursuit of the felon for his apprehension and conviction, and that is for two severall purposes, one to have restitution of his goods, as in the appeale of robbery and the like, and the other for the maintenance of the appeale it selfe, as here in the case of death, where no restitution of goods is to be had, but punishment of the offender by death, and that fresh sute which the plaintiffe in the appeale of death is to make, is here intended. What this fresh sute was at the common law doth notably appeare by Bracton, *Qui appellare voluerit et bene sequi, debet ille cui injuriatum erit, statim quam cito poterit butesum levare, et cum buteso ire ad villas vicinas et propinquiores, et ibi manifestare scelera et injurias perpetratas, et continuo accedere debet ad servientes domini regis, si inveniri possint et deinde ad coronatores, et sic inde sine intervallo ad proximum comitatum, &c.*

(17) *Deins l'an et le jour.*] Here the yeare is to be accounted for the whole yeare according to the kalender, and not according to 28 dayes to the moneth, and the day is intended of the naturall day, and by this act if the appeale of death be commenced within the yeare and the day, it is sufficient fresh sute, but after the yeare and day the appeale of death cannot be commenced.

If the next heire of the dead be within age, he must bring his appeale of death within the yeare and the day according to this act, but it hath been holden in many books that the paroll should demurre untill his full age; and the reason yeilded therefore is, that the defendant cannot wage battell, &c. But it hath beene often adjudged and approved by continuall experience of latter times that it shall proceed during his minority, and the reason of failer of battell is of no force, for that a man above seventy yeares of age shall

Braet. l. 3. fo.
139.
Britt. fol. 43.
Acc'.

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27 E. 3. 83. 32
E. 3. age 57. 45
E. 3. 21. 13 Aff.
10. 21 Aff. 24.
21 E. 3. 23.
11 H. 4. 94. 17
E. 4. 2. b. 27 H.
8. 11. a. Stamf.
Pl. Cor. fo. 60.
c. d.

shall have an appeale, &c. and yet the defendant shall be ousted of battell, and so if the plaintife in an appeale be mayhemed, &c. the defendant shall be ousted of battell, and yet the appeale shall proceed.

(18) *Après le fait.*] That is, after the felony by homicide committed.

If a man be mortally wounded, &c. the first day of May, and thereof dieth the first day of July, some doe hold that the appeale is to be brought within the yeare and day after the blow given, for that the death ensuing hath relation to it, and that is the cause of the death, and the offender did nothing the day of the death.

Here the law hath made a limitation in the appeale of death: by the ancient law justices in eyre did ride from seven yeare to seven yeare, and before them no plea of the crown could be inquired of for any offence committed before the last former eyre: so the justices in eyre in the kings forests may hold a justice seat from three yeare to three yeare. But no offence in the forest can be at the justice seat inquired of before the last former justice seat.

* But the yeare and the day shall be accounted from the death, for before that time no felony was committed, and thus it hath been often resolved and adjudged, and the reason above-said grounded upon relation, which is a fiction in law, holdeth not in this case.

If an appeale of murder be brought, and hanging the suit, and after the year and day is run out, one become accessary to the appellee, the plaintiffe shall have an appeale against him after the yeare and day past after the death, but it must be brought within the yeare and day after this new felony as accessary, for that in this case [*après le fait*] is understood after this new felony as accessary done.

Thus much shall suffice for the exposition of this law, more shall be said concerning appeales in the treatise of pleas of the crowne, whereunto it properly belongeth.

See the statute of 3 H. 7. cap. 1.

15 E. 2. Cor.
385.

Stamf. Pl. Cor.
fo. 63. a.

See the fourth part of the Inst. cap. Justices in Eyre, and all the auncient authors quoted there. See the fourth part of the Inst. cap. the Courts of the Forest. * Heydons case ubi supra.

26 Aff. p. 52.

C A P. X.

COME il soit contenue en lestatute le roy que ore est W. 1. cap. 43. que deux parceners, ou deux queux teigne en common, ne puissent fourcher per effoine, del heure que * ils ount un foits apparus en courte: purview est, que meisme ceo soit tenus et garde per la ou home et sa feme sont enpledes en la court le roy.

* [321]

WHEREAS it is contained in the statute of the king that now is, that two parceners, or two that hold in common, may not fourch by effoin, after that they have once appeared in the court: it is provided, that the same be observed and kept, where a man and his wife be impleaded in the king's court.

W. 1. cap. 43. (Fitz. Effoin, 5. 62.)

39 E. 3. 29.

The mischief before this statute was, that notwithstanding the statute of W. 1. the husband and wife (unless they were jointly enfeoffed) might fouch by essoine, for that statute extended but to parceners and joyntenants: see in the exposition upon the statute of W. 1. cap. 43.

13 E. 3. essoine 5.

This statute extendeth to common essoines, and not to essoine *de service le roy*.

3 E. 3. 29.

12 H. 4. 3.

38 E. 3. 18.

39 E. 3. 29.

12 H. 4. 1.

22 E. 3. 5. b. &

14. a. 2 E. 4. 1.

Also this statute extendeth onely to reall actions, and therefore in personall actions baron and feme may fouch by essoin.

Moreover this act extendeth to essoynes after appearance, that is, that all the tenants have appeared, and therefore baron and feme may fouch by essoine before appearance notwithstanding this act; hereby it appeared that essoynes, at the first allowed upon just cause, were afterwards used meerely for delay.

CAP. XI.

PURVIEW est ensement, que si home bailla en la cite de Londres (2) son tenement a terme des ans (1), et celui a que le franktenement est (3), se face empled' per collusion (4), et face default apres default, ou veigne en court, et la voile rendre (5) pur faire le termour perdre son terme, et le demandant eit querele (6), issint que le termour puisse aver recover' per brieve de covenant, le maire et les bailifes puissent enquirir (7) per bone visne en la presence del termour, et del demandant, le quel le demandant movest son plee per bon droit quel avoit, ou per collusion et per fraude pur faire le termour perdre son terme. Et si trouve soit per enquest, que le demandaunt movest son plee per bon droit quil avoit, ci soit le judgement performe maintenant. Et si trouve soit per enquest, que il luy empleda per fraud' pur toller le termour son terme, ci demurge le termor en son terme, et l'execution del judgement pur le demandaunt soit suspendus (8), j'esques apres le terme passe. Et en mesme le maner soit fait de equitie en tiel case devant justices, si le termour le challenge devant judgement (9) rendus.

IT is provided also, that if any man lease his tenement in the city of London, for term of years, and he to whom the freehold belongeth, causeth himself to be impleaded by collusion, and maketh default after default, or cometh into the court, and giveth it up, for to make the termor lose his term, and the demandant hath his suit, so that the termor may recover by writ of covenant: the mayor and bailiffs may inquire by a good inquest, in the presence of the termor and the demandant, whether the demandant moved his plea upon good right that he had, or by collusion, or by fraud, to make the termor lose his term: and if it be found by the inquest, that the demandant moved his plea upon good right that he had, the judgement shall be given forthwith: and if it be found by inquest, that he impleaded him by fraud, to put the termor from his term, then shall the termor enjoy his term, and the execution of judgement for the demandant shall be suspended until the term be expired. And in like manner it shall be of equity before the justices in such case, if the termor do challenge it before the judgement.

(2 Roll, 221, 222, 245. 21 H. S. c. 15. 1 Inf. 46. a. Rast. 31.)

The

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The generall mischief before this statute was, that the tenant for terme of yeares was subject to the pleasure of him that had the freehold, for if he had suffered a recovery in a reall action, though in truth it were by collusion (such credit the common law gave to recoveries in reall actions) the interest of the termour was overthrown, because he could not falsifie the recovery of the freehold, for that by the common law none could falsifie a recovery of a freehold, but he that had a freehold. This act provideth a twofold remedy: 1. for the city of London by writ in nature of a commission to the mayor and baylives grounded upon this statute, &c. 2. generally by receipt before judgement, which act Fleta doth render in these words, *Constitutum est, quod si quis in hujusmodi locis (viz. civitatibus et burgis privilegiatis) tenementum dimisit ad terminum annorum, et ille cuius liberum est tenementum permiserit se implacitari per collusionem, et defaultam fecerit post defaultam, (and so to the end) vide Fleta.*

Fleta, li. 2. c. 43.

Another mischief was, that after such a recovery had by collusion, and the lessee ousted thereupon, he should have his action of covenant at the least upon this word *dimisit*, (&c.) against the lessor, and so the termour lost his possession, and was driven to his action, which was a cause of multiplication of suits, *et boni legislatoris est lites dirimere.*

(1) *Bailla a son tenant a terme des ans.*] At the making of this statute there was neither tenant by statute merchant, nor staple, nor *elegit*, for these executions against lands were given by acts of parliament made afterwards, and yet having but chattels, they could not falsifie (as hath beene said) no more then tenant for yeares. And though in our books there be a *concessum* that tenant by statute merchant might falsifie, yet the reason yeelded there doth weaken the authority thereof, for there they give the reason, for that he was not made party, which he could not be in the *præcipe* he having but a chattell: and latter authorities are against it, and a judgement in parliament also, yet being in equall mischief, though they be created since our statute, yet are they within the remedy of this act, for upon the matter they are but termours. But otherwise it is holden in case of a gardein in chivalry, that he is not within this act, for he commeth not in by any contract betwene the parties, as lessee for yeares, and tenant by statute merchant, staple, or *elegit* originally doe, but meerly by act in law.

19 E. 3. Aff. 82.
10 E. 3. 46. 22
E. 3. 8. 16 E. 3.
receipt 100. 7 H.
4. 12. a. & b.
30 H. 6. Fauver
de recovery 9.
30 H. 6. 16. 9 E.
4. 38. 1 H. 7. 9.
7 H. 7. 12. Pl.
Com. 83. Kel-
wey 108. F.N.B.
198. Lib. 6. fo.
135. Bredimans
case. Lib. 9. 85.
Afcoughs case. |
21 H. 8. ca. 15.
24 E. 3. 27.
7 H. 4. 12.
Kelwey 123.

This termour for yeares intended by this law must be by deed by the expresse words of the body of this act, *essint que le termour eyt recovery per briefe de covenant*; which must be by deed, as in those dayes few were made otherwise, and so it was resolved by the court of common pleas, and this act required a deed, lest it might be used for delay. But now by the statute of 21 H. 8. cap. 15. tenant for yeares by deed or without deed may falsifie, and so by that law may tenant by statute merchant, staple, or *elegit* doe, which act being a beneficiall law is construed favourably.

33 H. 6. 41. b.
Pilot. 9 E. 4.
30. 19 E. 3. re-
ceit 15. 9 Eliz.
Dier.
Britton, 93. b.
Tr. 3 Jacobi in
Communi
Banco.
21 H. 8. ca. 15.
Lib. 11. fo. 33. b.
Powiters case.

(2) *En la citie de Londres.*] That is in the court of the hustings the greatest and highest court in London: it is called *hustingum* or *hustings* of two Saxon words, *viz. Huf. i. domus, et Ding. i. placitum*, so *hustingum* is as much to say, as *domus placitorum*, or *forum contentiosum*, where causes are pleaded; and other cities have the like court, and so called, as York, Lincoln, Winchester, &c.

Here the city of London is named, but it appeareth by that which hath been said out of Fleta, that this act extends to such cities and

Fleta ubi supra.

boroughs priviledged, that is, such as have such priviledge to hold plea as London hath.

But London was named for excellency, for that in those dayes it excelled in freedome and fulnesse of trade and merchandizing (with order, but without monopolizing) like the good bayliffes of the kingdome exporting our native, necessary, and reall commodities, and importing profitable and necessary commodities. And in those dayes the exportation farre exceeded the importation, whereby the realme flourished in all opulency and in multitude of ships, merchants, and mariners, aswell in war as in peace, insomuch as taking one example that was next my hand, in time when England was deeply ingaged in a long and chargeable war, the native commodities exported (as taking one year for example) amounted to the value of two hundred and twelve thousand, three hundred thirty and eight pounds, the ounce of silver then being xx. d. and the goods imported to the sum of thirty and eight thousand fourscore pounds, and nine pence; whereby it may be concluded what money was brought into the realm, and how much the exportation exceeded the importation.

And to the end, that merchants and others might enjoy the houses which they held for yeers, for the advancement of trade and traffique, London was particularly named.

(3) *Et celuy a que franktenement est.*] These words are stronger, then if the statute had said tenant, and yet the vouchee is taken within this, and the other branch also, as in the exposition upon the second branch shall be shewed.

(4) *Se face implead per collusion.*] But the termor that is to be received by the second branch, which referreth to this, must not onely alledge the collusion, but alledge matter for the safeguard of his interest, as there shall be shewed.

(5) *Face default ou voille render.*] Faint pleader is not taken to be within this act; see the last clause of this act.

(6) *Et le demandant est querel.*] That is, if the demandant have execution, and the termor ousted, so as he may have his action of covenant.

Regist. 179. a.

(7) *Le maire et les bailifes puissent enquirir, &c.*] And this enquiry must be done by writ in nature of a commission grounded upon this act, directed to the maior and bailifes, reciting the lease, the bringing of the action by collusion, and this statute, and concluding thus, *ideo vobis mandamus, quod convocatis partibus coram vobis, et inquisita super hoc plenius veritate, eidem A. (that is, the termor) de prædict' messuagio terminum suum quod justum fuerit, secundum formam statuti prædict' habere faciatis.* And so regularly, when any like authority is generally given by any act to do justice, it ought to be done by force of the kings writ grounded upon the act, and the writ grounded upon this act is called, *Breve de inquirendo veritatem super statutum Glouc.*

17 E. 3. fo. 29.
Kclw. 108. b.

(8) *Execution del judgement pur le demandant soit suspendus.*] So as the lessor and his heirs in the mean time having the reversion, notwithstanding the judgement, shall have the rent, and shall punish waste, &c.

4 E. 2. Receipt
159. 10 E. 3. 45.
21 E. 3. 1. 17 E.
3. 29.

(9) *En mesme le manner soit fait de equitie in tiel case devant justices, si le termor ceo challenge devant judgement.*] This termor must be by force of a lease by deed, as it was resolved Trinit. 3. Jacobi ubi supra.

This

This is the first act that gave receit in any case, and by force of this act the termor before judgement may pray to be received to defend the right and interest of his term upon the default, or render, or *nient dedire* of the tenant, but not upon faint pleader: and tenant by statute merchant, staple, and *elegit* are taken within this branch, aswell as within the former branch of this act.

And it is not sufficient for the termor to alledge collusion, but he must also traverse the point of the demandants writ, or plead some barre to his title; for this law that giveth him to be received, enableth him to plead for the safeguard of his interest.

The termor must be received before judgement, and albeit he doth defend his term, he shall not arrest judgement, but suspend execution during the term; for these words, *En mesme le manner*, maketh this branch in equiPAGE with the former.

If the tenant vouch, and the vouchee enter into warranty, and after make default, the termor shall be received; for albeit the first branch (whereunto this doth refer) is when he that hath the franktenement make default, yet in as much as the vouchee is tenant in law (this law being beneficiall for safeguard of the interest of the termor) he shall be received, for it is within the same mischief.

22 E. 3. 8.
19 E. 3. Receit
112. 9 E. 4. 30.
7 H. 7. 11, 12.
21 H. 7. 25.
14 H. 8. 4.
45 E. 3. 7. 27 H.
8. 7. 19 Eliz.
Dier 263. b.

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19 E. 3. Receit.
15.

14 H. 8. 4.
27 H. 8. 7.

C A P. XII.

PURVIEW est ensement, que si home soit implede de tenement en mesme la cite (1), et vouch forrein' a garrantie (2), quel veigne en la chancery et eit brieve de sommons (3) son garrantor a certe jour devant justices du banke, et un auter brieve au maire et as bailifes, que ils surcessent (5) en le parolle que est devant eux per brieve, jusques a taunt que le paroll' de le garrantee serra termine devant justices du bank (4): et quant le parol de la garrant' serra termine devant justices du bank, donques serra dit au garrant' que il veigne en la cite de Londres a respoign' de chiefe plee. Et le demandant per sa suit eit brieve de justices (6) de bank, au maire et as bailifes, que ils voient avant en le plee. Et si le demandant recover vers le tenant, veigne le tenant as justices de bank, et eit brieve au maire et as bailifes, que si le tenant eit la terre perdue, que ils facient extende la terre (7), et retourne l'extent en bank a certe jour, et apres soit.

IT is provided also, that if a man, impleaded for a tenement in the same city, doth vouch a forreigner to warranty, that he shall come into the chancery, and have a writ to summon his warrantor at a certain day before the justices of the bench, and another writ to the mayor and bailiffs of London, that they shall surcease in the matter that is before them by writ, until the plea of the warranty be determined before the justices of the bench; and when the plea at the bench shall be determined, then shall he that is vouched be commanded to go into the city, to answer unto the chief plea. And a writ shall be awarded at the suit of the demandant by the justices unto the mayor and bailiffs, that they shall proceed in the plea. And if the demandant recover against the tenant, the tenant shall come before the justices of the bench, which shall direct a writ to the mayor and bailiffs, that if the tenant have

Bb 3

loit

soit maunde au viscount du pais ou le garrantee fuist summons, que il luy face aver de la terre le garrantor a le value. Vide Articul' Glouc. correct' anno 9 Edw. 2.

lost his land, they shall cause the land to be extended, and valued, and shall return the extent at a certain day into the bench, and after it shall be commanded to the sheriff of the shire (where the warrantee was summoned) that he shall cause him to have as much of the land of the warrantor in value.

(Rast. 240. 354. Coke pla. f. 170. 41 Ed. 3. f. 2. Kel. f. 109. Fitz. Refceit, 106. Regist. 2. 9 Ed. 1.)

Regist. 2. b.
14 H. 4. 25.
See how this is corrected by the statute of 9 E. 2. intituled, *Articulis Statuti Glouc. correctis, &c.*

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Fleta, li. 2. c. 48.
Regist. 2. 7.
8 Aff. 22. 15 E. 3.
Record 37. 49 E.
3. 9. 3 Aff. p. 10.
10 E. 3. 24. Record 13. 11 H. 4. 27. 28. 14 H. 4. 25. 18 H. 8. 1. 5 E. 6. Dier 69. 12 E. 3. Voucher 115. 21 E. 3. ibid. 122. 13 E. 1. ibid. 269. 35 E. 3. ibid. 316. 8 E. 4. 10. 34 H. 6. 42. 13 E. 4. Cause de remover plea 23. Temps E. r. Gar de Chartres 23. 1 H. 7. 30. 27 H. 8. 12. Pasch. 15 H. 8. Rot. 34. in communi banco. 46 E. 3. Voucher 223. 3 H. 4. 12. a. 32 H. 6. 26. 34 H. 6. 42. F. N. B. 6. b.

The mischief at the common law, when the tenant did vouch one to warranty, and prayed that the vouchee might be summoned in a forrein county, was the great delay that the demandant had thereby, and specially in London, for that in London the plea could not be removed neither by *tolt* nor *pone*; but the plea was put without day, and the record removed by the kings writ into the court of common pleas, &c. and some did hold, that at the common law the inferiour court was put out of jurisdiction: but now by this statute, and that of 9 E. 2. the demandant shall sue out of the chancery a writ of *summons ad warrantizandum* against the vouchee, retornable before the justices of the court of common pleas at a certain day, and another writ out of the chancery called a *recordare* to the maior and bailifes to remove the record before the same justices at the same day, and thereupon the maior and bailifes, being required thereunto by that writ, to prefix the day of the return of that writ to the parties to appear at the return of that writ; and when the court of common pleas hath determined of the warranty, then the vouchee shall be commanded to go into London to answer to the chief plea, and by a judiciall writ the court of common pleas shall remand the record, requiring them to proceed in the same plea; and so forth, as it is contained in both these acts.

(1) *En la cite.*] That is, the cite of London specially named for the cause aforesaid, but extended by equity to all other privileged places where a forrein voucher is made, as to Chester, Durham, Salop, &c.

Ancient demesne is (as some do hold) within this statute, because the freehold is in the tenants, and is within these words (*Soit implead de tenement*) but otherwise it is of a tenant by copy roll in a court baron, because he hath no franktenement.

(2) *Vouch forrein a garrantie.*] *De forinsecis vocatis ad warrantiam*, that is, when one is vouched, and the tenant prayeth that the vouchee may be summoned in a forrein county.

▪ This act being a beneficiall law for furtherance of justice, and for ousting of delay is taken in this point also by equity, not onely to forrein pleas in reall actions, but also to pleas although they be not forrein, yet for default of power to proceed, the same shall be removed *ut supra*, and remanded *ut supra*: as if in an action auncetrell the tenant plead bastardy in the demandant, or in a writ of dower the tenant plead *unques accouple in loyell matrimony*, neither the

^b the court in London, or any like inferiour court cannot award a writ to the biſhop for tryall thereof, for *nullus alius præter regem poſſit epiſcopo demandare inquisitionem faciendam*. And another treating of the plea of *ne unques accouple*, in barre of a writ of dower, ſaith, *ac ſi alius quam rex demandaret epiſcopo quod inde inquireretur, epiſcopus alterius mandatum quam regis non tenetur obtemperare*; and herewith agree our books in all ſucceſſions of ages.

And therefore if ſuch pleas be pleaded in London, or ſuch other inferiour courts, the record ſhall be removed; and after a writ to the biſhop, and certificate made by the biſhop, the record ſhall be remanded: ^c and it appeareth that this act doth extend to real actions wherein voucher lyeth, and not to perſonall actions; ^d and leſt that forrein vouchers ſhould be uſed for delay, they muſt ſhew a charter, &c. comprehending warranty to the court.

(3) *Voigne en la chancerie et eit briefs de ſummons, &c.* ^e This is corrected and altered by the ſaid article upon this ſtatute in *an.* 9 E. 2. for by that ſtatute the maior and bailifes ſhall adjourn the parties before the juſtices of the bench at a certain day, and ſhall ſend the record thither, *Et le juſtices face ſummon le garrantee devant eux et pledent le garrantie*, and hereby the juſtices of the bench ſhall award the ſummons *ad auxiliandum, &c.* and ^f not fetch it out of the chancery: and by the ſaid act of 9 E. 2. it is provided, that if at the day given in banke the tenant make default, a petit cape ſhall be awarded to the maior and bailifes, to give judgement upon that default, if it cannot be ſaved, &c.

In a præcipe in the huſtings in London, the tenant voucheth one in London, and other forrein vouchees in the county of Norfolk, &c. In this caſe aſwell the voucher within London as the forrein vouchers ſhall be removed, for although the words of this act be, *vouch forrein a garrantie*, yet becauſe proceſſe muſt be made againſt all the vouchees at one time, and if proceſſe ſhould be made by the court of common pleas only againſt the forrein vouchees, although they came in, they ſhould not warrant, nor answer without the others before proceſſe were determined againſt them in London; ſo as neceſſity requireth, that proceſſe ſhould be made againſt all at one time, and that ought to be done in the more worthy court, and when the warranty is determined in the court of common pleas, all ſhall be remanded.

(4) *Que le parol del garrantie ſerra termine devant les juſtices del banke.* ^g This is the power given to the juſtices of the court of common pleas, and this act is in nature of a commiſſion to them, therefore it is good to be ſeen what is within their commiſſion, the words of the ſaid writ of recordare are, *Ut terminata warrantia illa coram præſat' juſtic' eadem recordum et proceſſ' vobis remittamus, &c.*

If the tenant vouch a foreiner to warranty, and the record is removed into the court of common pleas to determine the warranty, the vouchee may vouch over in a forein county, and that vouchee may vouch over, and if the vouchee make default, the court may make proceſſe againſt him, &c. *Quia quando lex aliquid alicui concedit, omnia incidentia tacite conceduntur*; but none of the vouchees can plead in chief, but that muſt be pleaded in the inferiour court, for that is not within the ſaid commiſſion given by this act. But if the demandant in banke appear not, the court may

B b 4

award

^b Braſt. 1. 3. fo. 106. Brit. f. 248. b. Fleta, li. 5. c. 24. 8 E. 3. 59. 14 E. 3. Trials 63. 24 E. 3. 33. 42. 40 E. 3. 2. 44 E. 3. 28. 35 H. 6. 30. 36 H. 6. 33. 37 H. 6. 30. 14 H. 7. 21. 21 H. 7. 34. 35. 14 H. 4. 25. b. Judgement cite per Hankford. ^c 3 H. 4. fo. 12. 32 H. 6. 26. ^d 35 E. 3. Voucher 316. ^e 9 E. 2. ubi ſupra.

^f See a notable caſe, Paſch. 31 E. 3. fo. 31. a & b. in libro meo.

49 E. 3. 9 & 10. 50 E. 3. Voucher 217. 29 Aff 48.

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18 E. 3. 1. 49 E. 3. 9. 10. Paſch. 15 H. 8. Rot. 343. in communi banc. 5 E. 6. Dier 69.

Kelw. 109. 13 E. 3. Vouch. 18. 32 E. 3. ibid. 101. 50 E. 3. ibid. 217. 41 E. 3. 31. 42. 42. 3. 1. 49 E. 3. Vouch. 223. 20 E. 3. Effin 23. 8 Aff. 22. 16 E. 3. Effin 167. 28 H. 8. 1.

award a non-suit as incident, and so the tenant in banke may be essoined.

In dower in the hustings in London against the husband and wife, who vouch a foreiner to warranty, whereupon the plea is adjourned into the common pleas at a certain day, at which day the husband and wife sued out a writ against the vouchee; whereupon the vouchee appeared, and the baron made default, and the wife prayed to be received upon his default; and by the rule of the court she was received, and that it was within their commission, for that the default was made in this court, whereupon the land was to be lost if she were not received; for it is a maxime in law, *Neceffitas sub lege non continetur, quia quod alias non est licitum, neceffitas facit licitum*, but yet others are of another opinion.

(5) *Un auter brieve al maire et bailifes que ils surcees*, &c.] That is, the said writ of *recordare*, whereby they are commanded *quod recordum et processum ejusdem loquelæ cum omnibus ea tangentibus justiciariis nostris de banco sub sigillo vestro mittatis*, &c. which to them is a *superfedeas* in law.

(6) *Et le demandant per sa sute eit brieve des justices*.] 'This is a *procedendo in loquela* directed to the maior, &c. to proceed, which you may read in the Judiciall Register.

(7) *Que ils facient extender la terre*, &c.] For the better performance of this act, the tenant must surmise, that execution is sued against him, and pray a *venire fac' recordum*.

By force of this act the justices of the common pleas upon that record shall award a writ of *extendi et appreciari fac'*, to the maior and bailifes, which writs grounded upon this act are sufficient expostitions of the same, and will resolve many doubts that may arise thereupon.

A notable record you may read in *libro G.* in the chamber of the Guild-hall in London, fol. 7. in anno 24 E. 3. whereby it appeareth that Thomas Drokensfield and Emme his wife brought a writ of dower in the hustings, against Alice Colwell, to be indowed of a house in London, of the indowment of R. de Envil late her baron; the tenant appeared, and vouched to warranty Thomas son and heir of John de Colwell, and prayed that he might be summoned in the county of Middlesex, whereupon the record saith, *Dies datus est partibus coram justiciariis domini regis de banco apud Westm' in crastino purificationis, ut tunc fiat ibi juxta formam artic' Gloc', pro civibus London inde correcti*.

And there it appeareth that the justices of the common pleas awarded the summons against the vouchee, who appeared upon the grand cape, and entred into the warranty, *ideo loquela præd. remittatur in Husting' coram majore et vicecom' ut ibi ulterius fiat*, prout *hactenus de jure fieri consuevit*: whereupon a resummons was awarded in the hustings against Alice the tenant, *et idem dies* given to the demandant, at which day the tenant appeared and the vouchee also, and rendred dower, and thereupon judgement was given against Alice the tenant, *et dictum est per curiam dictæ Aliciæ, quoa sequatur in curia domini regis coram justiciariis de banco ad habendum de terra dict' Thomæ de Colwell tenentis per warrantiam in comitat' Midd', si sibi viderit expedire*. And after the tenant came into the court of common pleas, and prayed her remedy against the vouchee surmising that execution was sued against her, and a third part of the house delivered to the demandant, whereupon a writ issued out of

18 E. 3. 1. a. b.
tit. Reccit 106.

31 E. 3.
Reccit 125.

Bract. li. 2. f. 93.
31 E. 3. Reccit
125.

Regist. fo. 7.

Regist. judic.
fo. 73.

Hil. 24 E. 3. in
com. banc' Rast.
livre de Entres.
240. 354. 615.
Coke Pl. f. 176.
Note here the
foreign Voucher.

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of the court of common pleas, *ad venire faciendum recordum coram justic' de banco*: by which it appeareth that in the hustings by the forein vower, *placitum prædict' sine die remansit, et partes prædict' secundum formam statuti coram præfatis justiciariis nostris apud Westm', ut eadem Alicia versus prædict' hæredem de warrantia sua habenda secundum formam ejusdem statuti prosequi possit, adjornat' fuissent, &c.*

I have set forth this record the more at large for that it setteth forth this statute, and that of 9 E. 2. in their lively colours, so as a man may see that (as it were) acted, which by those acts is required. And I know that many have followed that precedent; which is worthy to be seene at large: but he that is desirous to reade this whole chapter in a small map, let him reade Fleta who saith, *De warrantis vocatis extra jurisdictionem hujusmodi locorum privilegiatorum (viz. civitat' et burgorum, &c.) taliter statutum est, quod si implacitati per breve de reâto aliquem forinsecum vocarunt ad warrantum, tunc perquirant sibi de cancellaria duo brevicia, viz. ad summon' warrant' coram justic' de banco ad certum diem, et aliud balivis civitatis, quod placitum illud supersedeant, donec de placito warrantiæ fuerit terminat', quando terminat', dicatur warrantis, quod adeant civitatem et respondeant de placito principali, et habeant brevicia judicialia ad balivos quod tenementa petita extendantur si fuerint amissa, et retournentur extenâ ad certum diem coram justic' per quos mandetur vicecom' quod faciat tenentibus habere ad valenciam eschambium.* And it is worthy the observation that at the common law in case of a forein vower in the hustings of London, the plea was adjorned before the justices in eyre, when they came to the tower of London; for the court of the hustings London was not derived out of the jurisdiction of the court of common pleas, as other courts that have power to hold pleas reall are, and therefore the adjournment was (as hath been said) before the justices in eyre: for the antiquity of this court of hustings amongst the laws of S. Edward, you shall reade, *Debet enim in London, quæ caput est regni et legum, semper curia domini regis singulis septimanis die Lunæ hustingis sedere, et teneri, &c.*

Fleta, ll. 2. c. 43.

Int' leges Ed.
Regis Lamb.
136. b.

C A P. XIII.

PURVIEW est ensement, que del heure que plee serra move (1) en la citie de Londres per briefe, que le tenant (2) neit power de faire waste (4), ne estrepeement du tenement que * est en demaunde (3) pendant le plee (5), et sil face, le maire et les bailifes facent garde a le suit le demandant. Et mesme le ord' et statute soit garde en auters cities, boroughs, et ailours per tout le roialme.

* [328]

IT is provided also, that after such time as a plea shall be moved in the city of London by writ, the tenant shall have no power to make any waste or estrepement of the land in demand (hanging the plea) and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant. And the same ordinance and statute shall be observed in other cities, boroughs, and every where throughout the realm.

(Rast. pla. f. 317. 14 H. 7. f. 7. 10. Dyer, f. 325. 5 Rep. 115. Godbolt, 112. pl. 134. Regist. 76.)

Before

Bract. fo. 355.
 4 H. 3. Estrepe-
 ment 12. 22 E.
 3. 2. 21 E. 3. 51.
 4 E. 3. 32. 6 H. 4.
 1. 5 E. 2.
 Estrepe-
 ment 11.
 2 H. 6. 13. 3 E.
 6. 16. 21 E. 3. 51.
 34 E. 3. Estrepe-
 ment 14.
 Lib. 5. fol. 48.
 Littletons case.
 Regist. 126.
 F.N.B. 61.

Before this statute there lay at the common law a writ of estrepement after judgement, and before execution; and so an estrepement doth lie for waste done after verdict, and before judgement.

There are two kinds of estreplements prohibiting waste *pendente placito*, one originall, and may be sued out of the chauncery, either together with the originall *præcipe* by which the land is demanded, or at any time after *pendant le plea* directed to the sheriffe, the party, or both; the other is judiciall to be graunted by that court where the plea dependeth.

And some doe hold that the originall writ of estrepement did lie at the common law to prohibit any waste done *pendente placito*, for (say they) there lieth a writ *de bonis arrestandis ne dissipentur pendente placito*, &c. à fortiori in case of inheritance, wherein if waste should be done, it should be inconvenient, and against the common wealth: but certain it is, that the judiciall writ is given *pendente placito* by this statute.

Mirror, fo. 76.

(1) *Que plea serra move.*] Some doe hold that this is to be intended of reall actions, wherein no damages are to be recovered, for that in reall actions where the demandant shall recover damages, he shall recover damages *pendant le briefe*, and that is the reason, that in those cases the demandant count to no damages, and therefore in those cases the tenant might be doubly charged, once in the estrepement, and again in the principall action. To this it is by some answered. 1. That this statute is generall to reall actions. 2. There is no mischief, for a recovery of damages in the one is a barre to the other. 3. It is (as hath been said) inconvenient and against the common-wealth that waste should be done. But where damages are to be recovered, but not *pendente placito*, there without question the estrepement doth lie.

Lib. 5. fo. 115.
 Foljambes case.

Rot. Parl.
 28 E. 3. nu. 19.

Amongst the petitions of the commons in the parliament holden in anno 28 E. 3. one was, that the writ of estrepement might lie in every action where the party should recover damages for estrepement after the writ purchased; and the answer was, the old law should be continued.

28 H. 6. 8. b.
 F.N.B. 61. b.

(2) *Que le tenant.*] If the tenant make a feoffement *pendente placito*, in law he remaineth tenant; and yet the demandant may have an estrepement against him and the feoffee also, and so against the tenant and the vowchee or *price in aide*.

22 E. 3. 2.
 F.N.B. 61. p.

If there be two tenants, the demandant may sue an estrepement against the one of them; and after judgement a writ of estrepement lieth against the tenant and stranger by the common law.

3 H. 6. 16.

In an estrepement the tenant shall not have his age, for it is in nature of a trespassse.

12 R. 2. Estrepe-
 ment 6.

In the estrepement *pendente placito*, the demandant shall not recover damages before judgement be given in the principall.

32 E. 3. ibid. 7.
 3 H. 6. 17.
 F.N.B. 61. h.

If an estranger of his owne wrong without the privy of the tenant doth estrepement or waste after the writ sued out, the tenant shall not be punished for this waste.

2 H. 6. 13.
 33 H. 6. 6.
 14 H. 7. 8. b.
 F.N.B. 61. i.
 Dier. 16 Eliz.
 315.

(3) *Dun tenement que est en demaund.*] In a *scire fac'* to execute a fine or a recovery (though no land be demanded thereby) yet may the plaintiffe have a writ of estrepement, for it is in equall mischief, and so it is in * a *quid juris clamat*, and in an attainat an estrepement doth lie, and yet no land is demanded.

34 E. 3. Estrepe-
 ment 15.

In an action of waste no land is demanded, and yet an estrepement in that case lieth.

In a *particione fac'* no estrepement doth lie, for both of them are in possession, and there is no reason, that one shall be restrained, and not the other,

If a formedon be brought of a mannor, and the demandant sue out an estrepement, and after that a tenancy escheat, the writ of estrepement extends to the land escheated, because it commeth in lieu of the services, and yet that land was not demanded.

(4) *Neyt power de faire waste.*] The tenant notwithstanding the prohibition in the writ of estrepement may cut down corn, or grasse, or underwood, or the like, so it be no waste or destruction.

(5) *Pendant le plea.*] This is to be understood of a judicall writ of estrepement granted out of the court of common pleas, &c. when the principall writ is returned, for before that it is not depending there, but the demandant may have an originall writ of estrepement (as hath been said) together with the principall writ out of the chauncery.

This act is so construed, that by a consequent the party shall recover damages for waste done (*pendente placito*) after the writ delivered, and therefore it is good policy to purchase the writ of estrepement together with the writ. Note the writ it selfe founded upon this statute is but a prohibition, and upon the attachment the parties doe pleade, &c.

But note upon the writ of estrepement at the common law, *viz.* after judgement, the plaintiffe shall recover damages for the waste done before without any prohibition formerly delivered.

And upon a writ of estrepement grounded upon this act, the sheriffe may resist them that doe offer to doe waste; and if otherwise he cannot doe it, he may lawfully imprison them, or make a warrant to others to doe it, and if necessity require it, he may take *posse comitatus*: so odious in law is waste and destruction.

4 E. 3. 32. Foljams case ubi supra.
12 R. 2. Estrep.
Br. 13. Pasch. 33
H. 8. Bendloes.

F.N.B. 61.

F.N.B. 61. c.

18 H. 8. 5.
2 H. 6. 13.

Regist. judic. 13.
22 E. 3. Estrepement 9.

Foljams case, ubi supra.

C A P. XIV.

LE roy grant de sa grace as citizens (1) de Londres, que la ou avant ces heures ceux queux fueront disseisies de leur franktenement en mesme la citee, ne poient recouer leur damages avant le venue des justices a la tower: que desormes iceux disseisies eyent leur damages per recognisans de l'assise, per le quel ils recouveront leur tenements, et les disseisors soient amercies devant deux barons dexchequer, queux un feits per an veindr' en le citee a cco faire.

Et

THE king of his special grace granteth unto the citizens of London, that whereas befores times they that were disseised of freehold in the same city could not recover their damages before the coming of the justices to the tower, that from henceforth the disseisees shall have damages by recognizance of the same assise whereby they recovered their lands. And the disseisors shall be amerced before two barons of the exchequer,

Et ceo soit maunde a tresorer et as barons dexchequer quels le facent faire chescun an per ii. de eux a lour lever apres la chaunceleure. Et les amercements per les summons del eschequer soient levies al oeps le roy, et al eschequer delivrees.

chequer, which shall resort once a year into the city to do it. And it shall be commanded unto the barons and to the treasurer of the exchequer, that they shall cause it every year to be levied by two of them at their rising after Candlemas. And the amerciements by summons of the exchequer shall be levied to the king's use, and be delivered at the exchequer.

[330]

Fleta, li. 2. c. 48.

Lib. intrat. Rast.
F.N.B. 7. 13.

Bract. 164. b.

The mischief before this statute was, that in London if one were disseised of his freehold, he could not in the assise of freshforce recover damages, but the land onely, because the assise of fresh-force did not lie by originall writ, but by bill; and therefore if he would recover damages, he must tarry untill the justices in eyre came into the tower, which came but once in seven yeares: and therefore this statute doth give damages in the assise of freshforce, and by equity it extendeth to Glocester, and to other cities and boroughs which by usage and custome hold plea of assise of freshforce by bill.

Note Bracton saith, *Recognitio assise novæ disseisinæ multis vigiliis excogitata et inventa recuperandæ possess. gratia, ut per summariam cognitionem absque magna juris solemnitate, quasi per compendium negotium terminetur*: and it was called [*assisa novæ disseisinæ*] in respect of the delay before the justices in eyre.

(1) *Citizens of Londres.*] Note London is a corporation by prescription, and therefore may have divers names of corporation, as namely here (citizens.)

CAP. XV.

PURVIEW est ensément, que le maire et les bailifes avant le venue de ceux barons enquerent des vines vendus encounter l'assise (1), et le presentent devant eux a lour venue, et donque soient amercies, la ou ils soient attendre, j'esque a le venue des justices errants. Dones a Gloucestre le quart jour de Octobre, lan du raigne le roy Edward fils le roy Henry, 6.

IT is provided also, that the major and bailiffes, before the coming of those barons, shall enquire of wines sold against the assise, and shall present it before them at their coming, and then shall be amerced where before they were wont to tarry unto the coming of the justiciars in eyre. Given at Gloucester the iiij day of October, the VI. year of the reign of king Edward, the sonne of king Henry. [*Rastell's translation.*]

The like mischief was concerning the enquiry of the breach of assise of wines, as before in the former chapter concerning the recovery of damages: therefore this act giveth power to the mayor and bailiffes to enquire of the breach of the assise of wine, and not to tarry till the justices in eyre do come.

(1) *Des*

(1) *Des vines vendus enconter lassise.*] This statute here intended Cap. 5. is limited by the statute *de pistoribus et braciatoribus*.

Affisa vini secundum affsam domini regis observetur, scilicet fixterium ad xij.d. Et si tabernarii illam affsam exceßerint, per majorem et balivos ostia claudantur, et non permittant vinum vendere, donec licentiam à domino rege obtinuerint. But this act is repealed by 21 regis Jacobi.

[331]

STATUTUM de WESTMINST. SECUNDO,

Editum Anno 13 Edw. I.

The Preface of the Statute of W. 2.

CUM nuper dominus rex, in quinquena Sancti Johannis Baptistæ, anno regni sui sexto, convocatis prælatiis, comitibus, baronibus, et concilio suo apud Gloucestre: quia plures de regno suo exheredationem patiebantur, eo quod in multis casibus, ubi remedium apponi debuit prius, non fuit per prædecessores suos, aut per ipsum remedium provisum, quædam statuta populo suo valde necessaria et utilia edidit, per quæ populus suus Anglicanus et Hybernicus sub suo regimine gubernatus, celeriore justiciam, quam prius, in suis oppressiõibus consecutus est, ac quidam casus, in quibus lex deficiebat, remanserunt indeterminati, et quidam ad reprimendam oppressiõem populi remanserunt statuend'. Dominus rex in parlamento suo, post Pascham, anno regni sui tertio decimo apud Westminster, multas oppressiões populi, et legum defectus, ad suppletionem dictorum statutorum apud Gloucester editorum, recitari, fecit, et statuta edidit, ut patebit in sequent'.

WHEREAS of late our lord the king, in the quinzim of Saint John Baptist, the sixth year of his reign, calling together the prelates, earls, barons, and his council at Gloucester, and considering that divers of this realm were disherited, by reason that in many cases, where remedy should have been had, there was none provided by him nor his predecessors, ordained certain statutes right necessary and profitable for his realm, whereby the people of England and Ireland, being subjects unto his power, have obtained more speedy justice in their oppressiões, than they had before; and certain cases, wherein the law failed, did remain undetermined, and some remained to be enacted, that were for the reformation of the oppressiões of the people: our lord the king in his parliament, after the feast of Easter, holden the thirteenth year of his reign at Westminster, caused many oppressiões of the people, and defaults of the laws, for the accomplishment of the said statutes of Gloucester, to be rehearsed, and thereupon did provide certain acts, as shall appear here following.

IT

IT is commonly called Westminster the second: Westminster, because this parliament was holden at Westminster; and the second, in respect of the former parliament holden at Westminster, called Westminster the first.

CAP. I.

* [332]

IN primis, de tenementis (1), quæ multotiens dantur sub conditione (2), videlicet, cum aliquis dat terram suam alicui viro et ejus uxori, et hæred' de ipsis (3) viro et muliere procreatis, adjecta conditione expressa tali (4.) Si hujusmodi vir et mulier sine hæred' de ipsis viro et muliere procreat' obissent, terra sic data ad donatorem, vel ad ejus hæredem revertatur. In casu etiam cum quis dat tenementum alicui in liberum * maritagium (5), quod donum habet conditionem annexam, licet not exprimatur in charta doni, quæ talis est. Quod si hujusmodi vir et mulier sine hæred' de ipsis viro et muliere procreat' obissent, tenementum sic datum ad donatorem, vel ad ejus hæredem revertatur. In casu etiam cum quis dat tenementum alicui, et hæred' de corpore suo exeuntibus (6), durum videbatur, et adhuc videtur, hujusmodi donatoribus, et hæredibus donatorum, quod voluntas donatorum ipsorum in donis suis expressa, non fuit prius, nec adhuc est observata. In omnibus enim prædictis casibus post prolem suscitata, et exeuntem ab ipsis quibus tenementum sic conditionaliter fuit datum, hucusque habuerunt hujusmodi feoffati potestatem alienandi (7) tenementum sic datum, et exhæredandi exitum eorum, contra voluntatem donatorum (8), et contra formam in dono expressam. Et præterea cum deficiente exitu de hujusmodi feoffatis, tenementum sic datum ad donatorem, vel ad ejus hæredes reverti debuit per formam in charta de dono (9) hujusmodi expressam, licet exitus (si quis fuerit) obisset per factum tamen

FIRST, concerning lands that many times are given upon condition, that is to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. In case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir. In case also where one giveth land to another, and the heirs of his body issuing; it seemed very hard, and yet seemeth to the givers and their heirs, that their will being expressed in the gift, was not heretofore, nor yet is observed. In all the cases aforesaid, after issue begotten and born between them (to whom the lands were given under such condition) heretofore such feoffees had power to aliene the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And further, when the issue of such feoffee is failing, the land so given ought to return to the giver, or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died: yet by the deed and feoffment of them (to whom land was so given upon condition) the donors

tamen et feoffamentum eorum, quibus tenementum sic fuit datum sub conditione, exclusi fuerunt hucusque de reversione eorundem tenementorum, quod manifestè fuit contra formam doni: propter quod dom^{us} rex perpendens, quod necessarium et utile est in prædictis casibus apponere remedium, statuit (10) quod voluntas donatoris, secundum formam in charta doni sui (12) manifestè expressam, de cætero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum (13) sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum remaneat post eorum obitum, vel ad donatorem, vel ad ejus hæredem (si exitus deficiat) revertatur (11), per hoc quod nullus sit exitus omnino, vel (si aliquis exitus fuerit, et per mortem deficiet) hærede de corpore hujusmodi exitus deficiente. Nec habeat de cætero secundus vir (14) hujusmodi mulieris aliquid in tenemento sic dato per conditionem, post mortem uxoris suæ, per legem Angliæ: nec exitus de secundo viro et muliere successionem hæreditariam (15): sed statim post mortem viri et mulieris, quibus tenementum sic fuit datum, post eorum obitum ad eorum exitum, vel ad donatorem, vel ad ejus hæredem (ut prædictum est) revertatur. Et quia in novo casu novum* remedium est apponendum (16): fiat impetranti tale breve.

* [333]

Præcipe A. quod justè, &c. reddat B. (17) tale manerium cum pertinentiis, quod C. dedit tali viro, et tali mulieri, et hæred^{es} de ipsis viro et muliere exeuntibus.

Vel,

Quod C. dedit tali viro in liberum maritagium cum tali muliere, et quod post mortem prædictorum viri et mulieris prædicto B. filio eorundem viri et mulieris descendere debet per formam donationis prædictæ, ut dicit.

Vel,

Quod C. dedit tali et hæred^{es} de corpore suo exeuntibus, et quod post mortem ipsius talis, prædict^{us} B. filio prædicti talis descendere debet per formam donationis, &c.

Breve per quod donator habet recuperare deficiente exitu, satis est in usu in cancel.

The writ, whereby the giver shall recover (when issue faileth) is common.

cancellaria (18). *Et sciendum est, quod hoc statutum quoad alienationem tenementi contra formam doni imposte- rum faciendam, locum habeat, et ad dona prius facta non extendatur* (19). *Et si finis super huiusmodi tenementum imposterum levetur, ipso jure sit nullus* (20). *Nec habeant hæredes huiusmodi, aut illi ad quos spectat reversio, (licet fuerunt plenæ ætatis, in Anglia, et extra prisonam* (21) *) necesse apponere clameum suum.*

mon enough in the chancery; and it is to wit, that this statute shall hold place touching alienation of land contrary to the form of the gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands, it shall be void in the law; neither shall the heirs, or such as the reversion be- longeth unto, though they be of full age, within England, and out of prison, need to make their claim. *Altered by 32 H. 8. c. 36.*

(1 Leon. 212. 1 Roll 48. 153. 158. 333. 357. 385. 2 Roll 429. Godbolt, 308. 367. pl. 458. Vaughan 365. Latch. 67. Savil 67. 88. 7 Rep. 33. Fitz. Tail, 11, 12, 13, 14. 16, 17, 18. 21, 22, 23. 1 Inst. 18. b. 19. a. 24. a. 223. b. 224. a. 12 Rep. 81. Fitz. Formed. 61. 65. Fitz. Tail, 9, 10. Fitz. Tail, 15. Hob. 293. Fitz. Garranty, 16. 46. 57. 59. 3 Co. 85. Fitz. Formed. 1. 27. 33. 35. 52. 54. 59. 62. 64. Fitz. Dower, 87. 3 Rep. 8. 5. 14. 7. 32, 33. 8. 35. 86. 166. 9. 105. 11. 72. 1 Inst. 327. b. Regist. 238. Co. pla. 317. 338. 341. Dyer 216. 247. Fitz. Fines 125. Fitz. Formed. 5, 6, 7. 11. 14. 22. 30. 42. 44. 46. 47. 49. 8 H. 4. f. 8. Fitz. Continual Claim, 9.)

See the first of the Institutes, sect. 14.

See the first part of the Institutes, sect. 13.

Brit. cap. 36.

(1) *In primis de tenementis.*] What inheritances may be intailed within this act, you may read at large in the first part of the Institutes, cap. Taile, sect. 14.

(2) *Multotiens dantur sub conditione.*] Before this statute, all inheritances were estates in fee, *viz.* either fee-simple absolute, or fee conditionall, or a qualified fee, whereof you may also read in the first part of the Institutes, sect. 1. And tenant of lands intailed, had before this statute a fee-simple conditionall subsequent; for albein Britton, who wrote before this statute, saith, that if any purchase to him and his wife, and to the heirs of them lawfully begotten, the donees have presently but an estate of free-hold for the term of their lives, and the fee accrueth to their issue, &c. taking the condition to be precedent, yet had the donees at the common law a fee-simple conditionall presently by the gift.

19 E. 2. Formd. 61. 30 E. 1. ibid. 65. Pl. come often in Lord Berkleys case.

For if lands had been given to a man and the heirs of his body issuing, and before issue he had before this statute made a feoffment in fee, the donor should not have entred for the forfeiture, but this feoffment had barred the issue had afterwards; which proveth that he presently by the gift had a fee simple conditionall, and this agreeth with the authority of Littleton, *ubi supra*.

Now for the better understanding of this act, seeing that the estate was conditionall at the common law, it is necessary to be known when the condition was performed, and to what purposes. If the donee had issue, he had not thereby a fee-simple absolute, for if after he had dyed without issue, the donor should have entred as in his reverter. But after issue had, the condition was performed to this purpose, that he might have aliened, and thereby have barred the donor and his heirs from all possibility of reverter for default of issue, for the heirs of his body (he having a fee conditionall) might have barred them as well before issue (as hath been said) as after: and to what other purposes the condition by having of issue

See the first part of the Institutes, ca. Tail, sect. 13.

issue was performed, *vide* the first part of the Institutes, *ubi supra*.

(3) *Et hæredibus de ipsis.*] For to a gift in tail made, this word [heirs] is requisite, unless it be in case of a last will, &c.

See the first part of the Institutes, sect. 1. & 14.

(4) *Adjecta conditione expressa tali, &c.*] If this condition expressed had not been added, the very gift would have implied so much.

(5) *In casu etiam cum quis dat tenementum alicui in liberum maritagium, &c.*] By this clause it appeareth that an inheritance passeth by these words frank-mariage, whereof we have in another place written at large.

See the first part of the Institutes, sect. 17.

(6) *In casu etiam cum quis dat tenementum alicui et hæredibus de corpore suo exeuntibus, &c.*] This act having put two examples of estates tail speciall, *viz.* the first to a man and to his wife, and to the heirs of their bodies; the second, of a gift in frank marriage, a speciall case, and a speciall estate in tail; here he putteth a case of an estate tail generall, not that the makers of this statute meant to enumerate all the forms of estates in tail, but to put these as examples, so as all manner of estates tail, generall or speciall, are within the purview of this act.

3 E. 3. 31, 32.
18 E. 3. 46.
33 E. 3. Tail 5.
Dier 1 Mar. 96.

(7) *Potestatem alienandi, &c.*] That is to say, by fine, feoffment, release, or confirmation.

8 E. 3. 379.
44 E. 3. 3.

But the tenant in tail had not onely *potestatem alienandi*, but *forisfaciendi, &c.* also; for if after issue had, he had been attainted of treason or felony, the land entailed had been forfeited, and thereby the donor barred of the possibility of reverter, and *forisfacere* is *alienum facere*, and therefore in this act is included in these words, *potestatem alienandi*. And so might the tenant in tail, before the making of this act, have charged the land with rent, common, or the like, to have bound his issue, but by this act he is restrained aswell to charge as to alien.

7 E. 3. 368.
5 E. 3. 141.
7 H. 4. 31.

But the having of issue before this act did not alter the course of descent, as in another place we have said.

3 E. 3. Formed.
46.

(8) *Exhæredandi exitum eorum contra voluntatem donatorum.*] Hereby it appeareth that there were two mischiefs before this act, *viz.* first, the disherison of the issues in tail; secondly, that it was *contra voluntatem donatorum, et contra formam in dono expressam*, for the donor and his heirs were barred of the possibility of reverter: and both these were wrongs, for which at the common law there lay no remedy; for disherisons, and breaking the expresse will and intention of the donor are wrongs which this act doth remedy.

See the first part of the Institutes, sect. 3.

In the first part of the Institutes, *ubi supra*.

Pl. Com. 247. a.

(9) *Per formam in charta de dono, &c.*] It was said before, *contra formam in dono expressam*, so as whether the estate were made by deed or without deed, it is all one to the intention of this act, and the most usuall gifts in tail being of inheritance, were by deed.

(10) *Propter quod dominus rex, &c. statuit.*] Albeit here be no mention made of the assent of the lords and commons (whose assents are necessary to the making of every law) yet forasmuch as in the preface of this parliament it is said, *dominus rex in parlamento suo, &c. statuta edidit*, and that this act and the rest were entred into the roll of the parliament, and that this word [*statuit*] implyeth the assent of the lords and commons, for it cannot be *statutum*

7 H. 7. 14.
11 H. 7. 27.
39 E. 3. 7.
For the divers forms of parliaments, see lib. 8. the Princes case. Bro. tit. Parliament 76.

without their assents, therefore it hath (as many other of like form) been without question received for an act of parliament.

(11) * 1. *Quod voluntas donatoris, secundum formam in charta doni sui manifeste expressam, de cætero observetur; 2, Ita quod non habeant illi, quibus tenementum sic fuerit datum sub conditione potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum remaneat post eorum obitum, vel ad donatorem, vel ad ejus hæredem (sic exitus deficiat) revertatur, &c.]* Upon these two branches, viz. that the will of the donor should be observed, and that the donee should not have power to alien, the judges by a threefold construction did not onely remedy all the said former mischiefs, but prevent all other that might arise.

1.

1. Therefore in execution of the will of the donor, and that he should have no power to alien either lands that lay in livery, or tenements that lay in graunt, they adjudged that the donee should not have a fee-simple, but divided the estates, and created a particular estate in the donee, and a reversion in the donor, so as where the donee had a fee-simple before, by this act he had but an estate taile, and where the donor had but a possibility before, which after issue might be barred at the pleasure of the donee, now by construction upon this act the donor had the fee-simple expectant upon the estate taile, which we call a reversion; so as by this division of the estates the donee after issue, or before could not barre or charge his issue, nor for default of issue the donor or his heirs, either by alienation, forfeiture, or any charge whatsoever.

5 H. 7. 14. vide c. 4. verb. quando ux' dotata, &c. et verb. non habeant aliud recuperare, &c. 9 E. 3. 22.

Sir William Herle chiefe justice of the court of common pleas said of them that made this statute, *Ilz fueront sages gens queux fieront cest statut; and I may say as truly, Que ils fueront sages gens queux interpreteront cest act.* And in another place he saith, *Nous veuimus ceux queux fieront lestatut, & auxi en temps de quel roy lestatut fuit fait, que fuit le plus sage roy que unques fuit, & le cause del statut fuit, a server le heritage en le sang ceux as queux le done se fist.*

5 E. 3. 14.

2.

The second construction was, that no lineall warranty should barre the issue in taile, unlesse there were assents descended in fee-simple from the same auncestor, but a collateral warranty made by a collateral auncestor should barre the issue in taile without assents, for that warrantry is not restrained by this act, whereof we have spoken at large in another place; and so likewise the collateral warranty of the donee shall barre the donor, and is not restrained by this act, as well as the warranty of the donor shall barre the donee, as there also it appeareth.

See the first part of the Institutes, sect. 712.

3.

The third construction was, that albeit tenant in taile was restrained from power of alienations, yet of lands and tenements that lay in livery, his fine or feoffment should worke a discontinuance, and drive the issue in taile to his action: for seeing he had an estate of inheritance, the judges compared it to the case where a man was seised in the right of his wife, or a bishop in the right of his bishoprick, or an abbot in the right of his monastery, *et sic in similibus*; and of inheritances that lay in graunt, as of rents, advowsons, and the like, tenant in taile could not make any discontinuance, no more then the others before recited might doe, which construction was made according to the rule and reason of the common law in other like cases.

(12) *Secundum formam in charta doni sui, &c.]* This holdeth, though there be no deed, as before hath been said.

(13) *Non*

(13) *Non habeant illi quibus tenementum sic fuerit datum.*] It was adjudged by Beresford, that the issues in taile should not alien no more then * they to whom the land was given, and that was the intent of the makers of this act, and it was but their negligence, that it was omitted, as there it is said. In this case by way of purchase the land is given to the donees, and by way of limitation to the issues in taile, and therefore by a benigne interpretation the purview of this extends to the issues in taile.

5 E. 2. Formedon 52.
4 E. 3. 29.

(14) *Nec habeat de cætero secundus vir, &c.*] These are but consequents to the words of the purview, and are but explanatory, and not of substance, and might well have been omitted.

Pl. Co. 247. S. eg.
Berklies case.

Yet was it adjudged soon after the making of this act, that where lands were given in frankmarriage, and the husband died, and the wife took another husband, and had issue before this act, that the husband should be tenant by the curtesie, and the principall reason was upon this branch of the statute, *Nec habeat de cætero secundus vir, &c.* for that this restraint proved, as there it is said, that the law before was, that he should be tenant by the curtesie, and yet without question the issue should not inherit that land.

10 E. 1. Form. 66. Vide Pasc.
18 E. 1. in banco
Rot. 27. in Dower.

(15) *Successionem hereditariam.*] In auncient time if land had been given to I. S. and his successors, hee had had a fee-simple, but otherwise it is at this day, as it appeareth in the first part of the Institutes, sect. 1.

(16) *Et quia in novo casu novum remedium est apponendum.*]

Ea quæ de novo emergunt, novo indigent remedio.

Hereby it appeareth that a formedon in the descender lay not at the common law, but was given by this act, and the forme of the writ is here set downe.

Regu'a.
10 E. 2. Formed.
55. 4 E. 2. ib. 50.
21 E. 3. 47.
F.N.B. 2:1. Pl. Com. 240.
Fleta, li. 5. c. 34.
Regist. 238, 239.
5 H. 7. 17. b.

(17) *Præcipe A. quod juste reddat B, &c.*] Here is the forme of the formedon in the descender set downe, and therefore this statute need not be recited, nor any statute which giveth the forme of the writ.

(18) *Breve quod donator habeat recuperare deficiente exitu satis est in usu cancellaria.*] The formedon in reverter did lie at the common law, but not a formedon in remainder upon an estate taile, because it was a fee-simple conditionall, whereupon no remainder could be limited at the common law, but after this statute a remainder may be limited upon an estate taile in respect of the division of the estates.

Regist. 243.
F.N.B. 217,
218.

(19) *Sciendum est quod hoc statutum quoad alienationem tenementi contra formam doni imposterum faciendam locum habeat, et ad dona prius facta non extenditur.*]

This clause ought to receive a two-fold interpretation. 1. That [ad dona prius facta] must be intended of feoffements or alienations made by the donee or his issues, and not to gifts made by the donor, for to them this act doth extend.

4 E. 2. Formed.
50. 12 H. 4. 7.
21 E. 3. 45. Pl. Com. 246. First part of the Instit. sect. 729, 730.

2. *Dona prius facta*, that is, *post prolem suscitata*, for then the alienation by the tenant in taile, or his issues was good in law: so as [dona] here are to be intended lawfull gifts, and made in due manner, and such as could not be avoided, for law alloweth no wrong.

6 E. 3. 20. 8 H. 4. 10. 33 E. 3. Eftoppel, 280.
33 H. 6. 18.

(20) *Et si finis super hujusmodi tenementum imposterum levetur, ipso jure sit nullus.*] This act doth not make the fine void, but *ipso jure sit nullus*, that is, it shall not binde the right, yet it shall (as hath been said) make a discontinuance.

But now by the statutes of 4 H. 7. cap. 24. and 32 H. 8. cap. 34. a fine levied with * proclamations doth barre the issues in taile, but a fine without proclamations is a discontinuance onely, and no barre.

See the first part of the Institutes, sect. 440. Customier, cap. 48.

See the first part of the Institutes, sect. 441.

4 H. 7. cap. 24. Stat. de modo levand. finis. 18 E. 1.

(21) *Nec habeant hæredes hujusmodi, nec illi ad quos spectat reversio, licet fuerint plenæ ætatis, in Angliâ, et extra prisonam.*] Here is *non compos mentis* left out, and so is a *feme covert*.

Hereby it may be gathered (as the law was), that a fine at the common law did not binde a stranger that was within age, in prison, or beyond the seas.

See more for the construction of this statute in the first part of the Institutes, sect. 21, 22, 23. 271. 362, 363. 441. 746, 747.

C A P. II.

QUIA domini feodorum distringentes tenentes suos (1) pro servitiis et consuetudinibus sibi debitis multotiens gravantur per hoc, quod cum tenentes sui districtionem suam per breve, vel sine brevi replegiaverint, ac cum ipsi domini (ad querimoniam tenentium suorum) ad com', vel ad aliam curiam (3) habentem potestatem placitandi placita de vetito namio (2), per attachiament' venerint, et rationabilem et justam districtionem advocaverint, per hoc quod tenentes disavocant (4) nihil tenere, nec clamant tenere de eo qui districtionem fecit, et advocavit, remansit ille qui distrinxit in misericordia, et tenentes sui quieti, quibus pro illa disavocatione per recordum com', sive aliarum curiarum, quæ recordum non habent, pœna infligi non potest. De cætero provisum est et statutum, quod cum hujusmodi domini in com' vel hujusmodi curia justiciam de hujusmodi tenentibus suis consequi non possint, quam cito attachiati fuerint ad sectam tenentium suorum, concedatur eis breve ad ponend' loquelam (6) illam coram justiciariis (5), coram quibus et non alibi justiciam hujusmodi dominis exhiberi poterit, et inseratur causa in brevi, quia talis distrinxit in feodo suo pro servic' et consuetud' sibi debitis. Nec per

FORASMUCH as lords of fees distraining their tenants for services and customs due unto them, are many times grieved, because their tenants do replevy the distress by writ, or without writ: and when the lords, at the complaint of their tenants, do come by attachment into the county, or unto another court, having power to hold pleas of withernam, and do avow the taking good and lawful, by reason that the tenants disavow to hold ought, nor do claim to hold any thing of him which took the distress and avowed it, he that distrained is amerced, and the tenants go quit; to whom punishment cannot be assigned for such disavowing by record of the county, or of other courts having no record. It is provided and ordained from henceforth, that where such lords cannot obtain justice in counties and such manner of courts against their tenants, as soon as they shall be attached at the suit of their tenants, a writ shall be granted to them to remove the plea before the justices, afore whom, and none elsewhere, justice may be ministred unto such lords; and the cause shall be put in the writ, because such a man distrained in his fee for services and customs to him

cue.

per istud statutum derogat' legi communi usitatae, quod non permittit aliquod placitum poni coram iustic' ad petitionem defendentis (7): quia licet prima facie videatur tenens actor, et dominus defendens, habito tamen respectu ad hoc quod dominus distrinxit, et sequitur pro servitiis et cons. sibi a retro existen' realiter apparebit potius actor, sive querens, quam defendens (8). Et* ut in certo sint iustic' (9) de qua recenti seisinā poterint domini advocare rationabilem distractionem super tenentes suos: de cætero concordatum est, quod rationabilis distractio poterit advocari de seisinā antecessorum vel predecessorum suorum, à tempore quo breve novæ disseisinæ currit. Vide W. 1. cap. 38. Et quia aliquando contingit, quod tenens postquam replegiaverit averia sua, averia illa vendit vel elongat, quo minus retorum possit fieri domino distringenti, si adjudicetur: provisum est, quod vicecomes, vel balivi de cætero non recipiant à conquerentibus solummodo plegios de proseguendo, antequam deliberationem faciant de averiis, sed etiam de averiis retornandis (10), si adjudicetur retornand'. Et si quis anno modo plegios ceperit, respondeat ipse de precio averiorum. Et habeat dominus distringens recuperare per breve, quod reddat ei tot averia, vel catalla. Et si non habeat balivus unde reddat, reddat superior suus (11). Et quia aliquando contingit, quod postquam adjudicat' fuerit distringenti retorum averiorum, et sic distractus, postquam averia sic retornata (13) iterum replegiaverit, et cum viderit distringent' comparentem in curia paratum sibi respondere, default fecerit (12), ob quam iterum readjudicabitur distringenti retorum averiorum, et sic bis, vel ter, et in infinitum (14) replegiabuntur averia, nec habebunt judicia (15) curiæ regis in hoc casu effectum, super quo non fuit prius remedium provisum. Ordinat' est in hoc casu talis processus, quod

due. Neither is this act prejudicial to the law commonly used, which did not permit that any plea should be moved before justices at the suit of the defendant. For though it appear at the first shew that the tenant is plaintiff, and the lord defendant, nevertheless, having respect to that, that the lord hath distrained, and sueth for services and customs being behind, he appeareth indeed to be rather actor, or plaintiff, than defendant. And to the intent the justices may know upon what fresh seisin the lords may avow the distress reasonable upon their tenants; from henceforth it is agreed and enacted, that a reasonable distress may be avowed upon the seisin of any ancestor or predecessor since the time that a writ of novel disseisin hath run. And because it chanceth sometimes that the tenant, after that he hath replevied his beasts, doth sell or aliene them, whereby return cannot be made unto the lord that distrained, if it be adjudged: it is provided, that theriffs or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded. And if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distraineth shall have his recovery by writ, that he shall restore unto him so many beasts or cattle; and if the bailiff be not able to restore, his superiour shall restore. And forasmuch as it hapneth sometime, that after the return of the beasts is awarded unto the distrainor, and the party so distrained, after that the beasts be returned, doth replevy them again, and when he seeth the distrainor appearing in the court ready to answer him, doth make default, whereby return of the beasts ought to be awarded again unto the distrainor,

quod quam cito adjudicatum fuerit retorum averiorum distringenti per breve de judicio, mandetur vicecomiti, quod retorum habere faciat distringenti de averiis, in quo brevi inseratur, quod vicecom' ea non deliberet sine brevi, in quo fiat mentio de judicio per justic' reddit': quod fieri non poterit, nisi per breve quod exeat de rotulis justic', coram quibus deduci fuerit loquela (16). Cum igitur districtus adierit justic', et petierit averia sua iterum sibi replegiari, fiat ei breve de judicio (17), quod vic' (capta securitate de prosequendo, et etiam de averiis seu catallis retornand', vel eorum precio, si adjudicetur retorum) deliberet ei averia, vel catalla prius retornata: et attachietur ille qui distrinxit ad veniend' ad certum diem coram justic', coram quibus placitum deducatur in presentia partium. Et si iterato ille, qui * replegiaverit averia, fecerit defaultam, vel alia occasione adjudicetur retorum distractionis jam bis replegiat', remaneat distractio illa in perpetuum irreplegiabilis (18). Sed si de novo, et de nova causa (19) fiat distractio, de nova distractione servetur processus supradictus.

* [339]

distrainor; and so the beasts be replevied twice or thrice, and infinitely, and the judgements given in the king's court take no effect in this case, whereupon no remedy hath been yet provided; in this case such process shall be awarded, that so soon as return of the beasts shall be awarded to the distrainor, the sheriff shall be commanded by a judicial writ to make return of the beasts unto the distrainor; in which writ it shall be expressed, that the sheriff shall not deliver them without writ, making mention of the judgement given by the justices, which cannot be without a writ issuing out of the rolls of the said justices before whom the matter was moved. Therefore when he cometh unto the justices, and desireth replevin of the beasts, he shall have a judicial writ, that the sheriff taking surety for the suit, and also of the beasts or cattle to be returned, or the price of them (if return be awarded) shall deliver unto him the beasts or cattle before returned, and the distrainor shall be attached to come at a certain day before the justices, afore whom the plea was moved in presence of the parties. And if he that replevied make default again, or for another cause return of the distress be awarded, being now twice replevied, the distress shall remain irrepleviable; but if a distress be taken of new, and for a new cause, the process aforesaid shall be observed in the same new distress.

(16 H. 7. f. 1. Regist. 83. Dyer, 188. 2 H. 6. 15. 8 Ed. 3. 72. 9 H. 6. 42. Fitz. Return des Avers, 35. Cro. Car. 594. Dyer, 41. 59. Kel. 92. 26 H. 8. 6. 21 H. 7. 28. 12 H. 7. 4. 14 H. 7. 6. Dyer, 280. Fitz. Return des Avers, 6. 15. 18, 19. 24. 26. 32, 33, 34, 35.

(1) *Quia domini feoderum distringentes tenentes suos, &c.]*

Fleta, li. 2. c. 37.

In this preamble is the mischief set down, that was at the common law before the making of this act.

Mirror, cap. 5.
§ 5.

The Mirror without cause doth finde great fault with this act, which you may read, and being of no use need not here to be inserted.

(2) *Ad*

(2) *Ad comitatum vel aliam curiam habentem potestatem placitandi de vetito namio.*] *De vetito namio*, of a forbidden or unjust taking, and is not understood of a taking in withernam, for that is a just and no forbidden taking, as in another place I have proved more at large. Vide Marlebr. cap. 21.

(3) *Vel aliam curiam.*] So as lords of hundreds, wapentakes, &c. may have power to hold plea of replevin, &c. Marlbr. ubi supra F.N.B. 73. b.

(4) *Disadvocant, &c.*] That is disclaim, whereof the court being no court could have no consans, because it concerned free-hold. F.N.B. 70. b.

(5) *Quod cum hujusmodi domini in com' vel hujusmodi curia justiciam de hujusmodi tenentibus suis consequi non possunt, &c. concedatur illis breve ad ponend' loquel' illam coram justiciariis, &c.*] Failer of justice, is ever a good cause to remove the plea.

(6) *Ad ponend' loquelam.*] The writ of *pone* doth lye when there is a replevin depending by writ out of the chancery, the plaintife or defendant may remove the plea by a *pene*; and if the plea be depending in the county, the plaintife may remove the same without cause, but the defendant cannot remove it without cause, and that cause must be put in the end of the writ. And if it be upon this statute, the words be, *Quia prædict' B. cepit averia prædict' in feodo suo pro consuetudinibus et servitiis ut dicitur*, which are the very expresse words of this act. Fleta ubi supra. F.N.B. 69. in Regist. 84. a.

And when the plaint is in the county by writ or without writ, or in the court of any other, the same may be removed by a writ of *recordari fac' loquelam*. Regist. ubi sup.

And if the plaint be in the county, the plaintife may remove the same without cause, as hath been said; but the defendant cannot remove it (as hath been said) without cause. But if the plaint be in the court of any other, neither the plaintife nor defendant can remove the plaint without cause, for the prejudice that may come thereby to the lord.

(7) *Quod non permittit aliquod placitum poni coram justic' ad petitionem defendentis.*] This must be understood without cause shewed, for by the common law, the defendant for cause shewed might remove the plaint. F.N.B. 70. a. Regist. 83.

(8) *Potius actor sine querens quam defendens.*] In truth the defendant by making avowry doth become actor, and shall have judgement given for him, and after avowry he shall not have a protection cast for him no more then a plaintife shall, because he is become an actor, and not meerly a defendant.

(9) *Et ut in certo sint justiciarii, &c.*] It was a doubt before this act, within what limitation of time an avowry might be made, and by this act it is provided, *Quod rationabilis districcio poterit advocari de seiscina antecessorum, vel prædecessorum suorum a tempore quo breve novæ disseisinæ currit*; which limitation in an assise appeareth before in W. 1. cap. 38. which was *post primam transfectionem regis H. 3. in Vasconiam*, in the fift yeer of his reign. But this limitation, both in the assise and in the avowry, is altered by a latter statute. [340]
5 H. 5. 5.

(10) *Non solummodo plegies de prosequendo, &c. sed etiam de averiis retornandis, &c.*] If the sherife return insufficient pledges, they are no pledges within this statute, and in that case the sherife shall be charged by this act, as if he had taken no pledges at all. 5 H. 3.
W. 1. cap. 38.
32 H. 8. cap. 3.
Fleta, li. 2. c. 38.
Regist. Judic. 4.
2 H. 6. 15.

If the return of pledges be upon a writ of replevin, then if the plaintife be nonsute, &c. if upon the writ *de retorno habendo*, the sherife return *averia elongata*, &c. the plaintife may have a writ to have return of the beasts of the pledges. But if the deliverance were by plaint, because in that case the pledges do not appear to the court, the plaintife can have no such writ.

And if upon the writ to have return of the beasts of the pledges, the sherife return *nihil*, then may the plaintife have a *scire facias* against the sherife, *quod reddat ei tot averia*, or *tot catalla*; and that which hath been said of the sherife, is to be intended of the bailife of a franchise.

(11) *Et si non habeat bali-vus unde reddat, reddat superior suus.*] *Vide* Simile, 44 E. 3. 13. *Vide* 52 H. 3. Lestature del Eschequer. *Vide* 2 H. 6. cap. 10.

(12) *Desalium fecerint*, &c.] At the common law, if the plaintife in the replevin had been nonsute either before or after verdict, the defendant that distrained should have had return, but not irreplevisable, so as the plaintife after nonsute might have had as many replevins as he would, which was vexatious and mischievous; for remedy whereof, this act doth restrain the plaintife from any more replevin after nonsute, but giveth a writ of second deliverance, whereof we shall speak in his proper place.

If the writ of replevin doth abate for want of form in default of the clerk, the defendant shall not have return at all; but if it abate for matter apparant by misinformation, or other default of the plaintife, the defendant shall have return, but not irreplevisable.

But if the defendant doth plead a plea to the writ, and the plaintife confesseth it, then the plaintife shall have return, but not irreplevisable, for the plaintife may have a new writ of replevin; for this act onely giveth remedy in case of nonsute.

But if the plea to the writ, or any other plea be tryed by verdict, or judged upon a demurrer, return irreplevisable shall be awarded, and no new replevin shall be granted, nor any second deliverance by this act, but (as it hath been said) upon a nonsute.

(13) *Averia sic retornata.*] Note neither court baron, nor county court, nor any court that is not the court of the king before his justices can award return irreplevisable.

(14) *In infinitum.*] *In infinitum in jure reprobatur.*

(15) *Nec habebunt judicia*, &c.] Here is a maxime of the common law implied, *viz. Judicia suum effectum habere debent. Judicium non debet esse illusorium.*

(16) *Per breve de judicio*, &c. *quod exeat de rotulis justic' coram quibus deducta fuerit loquela.*] The writ of second deliverance given by this act is a writ judiciall, as here it appeareth, and issueth out of the record of the replevin in which the nonsute was; and regularly the judiciall writ ought not to vary from the record, out of which it issueth; and therefore if after nonsute the sherife return *averia elongata*, and the defendant upon the withernam hath other beasts delivered to him, the plaintife is to have his second deliverance of the first beasts mentioned in the former record.

(17) *Fiat ei breve de judicio*, &c.] The effect of the writ of second deliverance is here set down, and appeareth in the Judiciall Register.

And

8 E. 3. 72.
39 E. 3. 28.

2 H. 6. 15.
9 H. 6. 42. & 48.

34 E. 1. Judge-
ment, 244.
34 H. 6. 37.

19 E. 2. Repl. 25.
6 E. 3. 37.
24 E. 3. 71.
21 E. 4. 6.

11 E. 2. Ret. des
avers 31. 10 E. 2.
ibid. 5. 41 E. 3.
ib. 14. 21 R. 2.
ib. 29. 3 H. 6.
2, 3. 27 H. 6. 3.
48 E. 3. 10.
49 E. 3. 24.
2 H. 4. 23.
4 H. 6. 8, 9.
34 H. 6. 37.
12 H. 7. 4, 5.
13 H. 7. Retorne
des avers misre-
port per Fitzh.
See the authori-
ties next before
concerning these
matters.
Temps E. 1. Ret.
des avers 33.

[341]

17 E. 2. Repl. 21.
6 E. 3. 37.
20 E. 3. Estopp.
186. 20 E. 3.
Avowry 125.
21 E. 3. 43.
16 E. 3. Aide
131. 3 H. 6. 9.
12 H. 7. 4.
21 H. 7. 28.
26 H. 8. 6. Vide
Mich. 31 E. 3.
fo. 50. in lib. mco.
Dier, 36 H. 8.
f. 59.
Regist. Judic. 53.

And this writ is a supersedeas in law to the sherife, that he make no return to the defendant upon the former nonsute.

(18) *Et si iterato, ille qui replegiaverit averia, fecerit defaltam, vel alia occasione adjudicetur retorum districtionis jam bis replegiat, remaneat districtio illa in perpetuum irreplegiabilis.*] If the plaintife in the second deliverance by nonsute, or if the plea be discontinued, or the writ abate, or if he prevail not in his sute, return irreplevisable shall be granted.

But if return irreplevisable be granted, the owner of the cattell or other goods distrained may come to the defendant and offer the arrerages, &c. and if the defendant refuse to deliver the distress, the plaintife may have an action of detinue, and by that means recover them, for they are in nature of a gage.

(19) *Sed si de nova causa.*] The second deliverance must be brought for the same distress, but if the same lord distrain the same tenant for a rent, or other service behinde at another day, or for another cause, there the replevin doth lye, and such proceeding as is abovesaid.

33 Avowry 256.
Dyer, 30 H. 8.
41. b.

5 E. 2. Ret. des
avers 64. 10 E. 2.
ib. 5. 33 E. 3. ib.
34. 8 R. 2. ib. 35.
6 E. 3. 37.
17 H. 8. Second
Deliverance.
Br. 15. Pl. Com.
82. b.
45 E. 3. 9.
14 H. 4. 4.
33 H. 6. 27.

C A P. III.

IN casu quando vir amiserit (1) per defaltam (2) tenementum, quod fuit jus uxoris suæ (3), durum fuit quod uxor post mortem viri non habuerit aliud recuperare, quam per breve de recto: propter quod dominus rex statuit, quod mulier post mortem viri sui habeat recuperare per breve de ingressu, cui ipsa in vita (4) sua contradicere non potuit, quod in forma subscripta erit placitandum (5). Si contra petitionem mulieris tenens excipiat, quod habuerit ingressum per judicium, et compertum fuerit, quod per defaltam, ad quod tenens necesse habet responderi, si ab eo queratur, tunc ulterius habet necesse ostendere jus suum, secundum formam brevis, quod prius impetravit super virum et uxorem. Et si verificare poterit quod* habuerit, vel habet jus in tenemento petito, nihil capiat mulier per breve suum. Quod si ostendere non poterit, recuperet mulier tenementum petitum: hoc observato, quod si vir absentaverit (6) sc, et noluerit jus uxoris suæ defendere, vel invita uxore sua reddere voluerit, si uxor ante judicium venerit

* [342]

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IN case when a man doth lose by default the land which was the right of his wife, it was very hard that the wife, after the death of her husband, had none other recovery but by a writ of right; wherefore our lord the king hath ordained, that a woman, after the death of her husband, shall recover by a writ of entry (whereto she could not disagree during his life) which shall be pleaded in form under-written. If the tenant do except against the demand of the wife, that he entered by judgement, and it be found that his entry was by default, whereto the tenant of necessity must make answer, if it be demanded of him, then he shall be compelled to make further answer, and to shew his right according to the form of the writ that he purchased before against the husband and the wife. And if he can verify that he hath or had right in the land demanded, the woman shall gain nothing by her writ; which thing if he cannot shew, the woman shall recover the land in demand; this being observed,

(7), *parata petenti respondere* (8), *et ius suum defendere* (9), *admittatur uxor*. Eodem modo (11) *si tenens in dower, per legem Angliæ, vel aliter ad terminum vitæ* (12), *vel per donum* (13) *in quo reservatur reversionis, fecerit defaultam, vel reddere voluerit* (16), *admittantur hæredes* (14), *vel illi ad quos spectat reversionis* (15), *ad responsionem* (17), *si venerint ante iudicium* (10). *Et si per defaultam, vel redditionem reddatur iudicium, tunc habeant hæredes, vel illi ad quos spectat reversionis, post mortem huiusmodi tenentium, recuperare per breve de ingressu* (18): *in quo observetur idem processus, sicut prædictum est in casu ubi vir amittat per defaultam tenementum uxoris suæ. Et sic in casibus prædictis duæ concurrunt actiones* (19) *una inter potentem et tenentem, et alia inter tenentem ius suum ostendentem et potentem. Vide 20 E. 1. defensio juris, fol. 88.*

observed, that if the husband absent himself, and will not defend his wife's right, or against his wife's consent will render the land, if the wife do come before judgement, ready to answer the demandant, and to defend her right, the wife shall be admitted. Likewise if tenant in dower, tenant by the law of the land, or otherwise for term of life, or by gift, where the reversion is reserved, do make default, or will give up; the heirs, and they unto whom the reversion belongeth, shall be admitted to their answer if they come before judgement; and if upon such default, or surrender, judgement hap to be given, then the heirs, or they unto whom the reversion belongeth after the death of such tenants, shall have their recovery by a writ of entry, in which like process shall be observed as is aforesaid, in case where the husband loseth his wife's land by default. And so in the cases aforesaid two actions do concur, one between the demandant and tenant, and another between the tenant shewing his right, and the demandant.

(Regist. 232. 6 Rep. 8. 8 Co. 72. 26 H. 8. 2. Fitz. Cui in vita, 7, 8, 9, 10, 11. 14. 16, 17. 19, 20. 22. 26. 28. 30. 32. 34. 1 Inst. 352. b. 353. a. 355. a. 356. a. Dyer, 298. 315. 341. Fitz. Receit, 1. 3. 5, 6. 9. 11, 12. 19. 27. 30. 32. 139. 10 Rep. 44. 5 Ed. 3. 61. Cro. Car. 43. Keilw. 128. Regist. 133. 32 H. 8. c. 28.)

10 H. 4. Dis-
seis. 7. 30 E. 3. 6.
Receit 128.
48 E. 3. Pl. Com.
57. b. 19 E. 2.
Receit 176.
2 E. 2. ib. 148.

32 H. 8. cap. 28.

(1) *Vir amiserit.*] This is to be understood of the husband and the wife, for the husband alone is not tenant to the *præcipe*, and therefore it was the opinion of Hankford, that if the land be recovered against the husband sole, that after the death of the husband the wife shall have an assise; but Fitzh. in abbreviating this case saith, that it is hard to be proved by reason, because the wife cannot be disseised (during the coverture) but where the husband is disseised, but of such a recovery she cannot have a *cui in vita* upon this statute: but seeing the husband was not tenant to the *præcipe*, this can be no discontinuance, and therefore not like to a feoffment, for that conveyance is compleat and good, but so is not the recovery, and therefore in that case the wife may enter after the death of her husband; but when the *præcipe* is brought against the husband and wife, it may be said that *vir amiserit*, for it is principally his act or default; and therefore though the words of the statute of 32 H. 8. be (suffered by the husband only) yet a feined recovery against the husband and wife is within that statute.

(2) *Per*

(2) *Per defaultam.*] A recovery by render is within the equity of this statute, because it is within the same mischief; but a recovery by action tried is out of this statute.

It is said, that a recovery by default in a cessavit against the husband and wife, doth binde the wife; but I hold the law to the contrary, unlesse the cause of the action be just, and then it bindeth, as in all other cases; for this act giveth no remedy, but where the recovery is without title.

In a *quid juris clam'*, *quod permittat*, assise of rent, *seire facias*, attain, &c. the wife upon default of the husband shall be received.

In a *quare impedit* against the husband and wife, the wife shall not be received upon the default of the husband; for the Record saith, *Inspecia causa confessionis statuti manifeste liquet, quod non est in casu consimili*; for the husband may present alone.

(3) * *Quod fuerit jus uxoris sue.*] This is intended of a fee-simple, for so is *jus* regularly taken; and this act saith, that the wife had no recovery but by a writ of right, which none can have but tenant in fee-simple, and so one part of this act doth expound another; and for tenant in taile (reduced formerly (as hath been said) at this parliament to a divided and particular estate) and for tenant for life provision is made in the next chapter by a *quod ei deforceat*, as shall be declared when we come thereunto; for tenant in taile, and tenant for life are out of the letter of this statute, because they could have no writ of right; and yet if the husband and wife seised in the right of his wife for terme of her life lose in a *præcipe quod reddat* by default, and the husband die, the wife shall have a *cui in vita*, for this is, as it were, a demise made by the husband, for otherwise she should be without remedy, for she cannot have a *quod ei deforceat*, as shall be said hereafter.

If lands during the coverture be given to the husband and wife, and their heirs, this is *jus uxoris* within this statute.

(4) *Cui ipsa in vita.*] Sir William Herle said, that he had seene in ancient time, that where the husband aliened the right of his wife, she had no other recovery but by a writ of right, yet I finde in Bracton and Fleta, that a *cui in vita* in their times lay upon the alienation of her husband.

(5) *Quod in forma subscripta erit placitand'.*] If the tenant doth plead in barre the recovery by default, he must averre the title of his writ, whereupon if issue be taken, and found for the tenant, the demandant shall take nothing by her writ, and if it be found for her, she shall recover the land.

(6) *Hoc observato quod si vir absentaverit.*] This act having before given the wife a *cui in vita* after the decease of her husband, doth by this branch give her a remedy upon the default, or redemption of her husband in his life time to defend her right, so as she should not be driven to a reall action after the decease of her husband, and this receipt to the wife is given by this act, which she could not have at the common law.

^a This act doth extend to courts that be not of record; as if husband and wife be sued in a court baron by writ of right, &c. upon the husband's default the wife shall be received.

Upon *seint pleder* of the husband, the wife shall not be received by the opinion of Prisot: but it is resolved in 8 E. 2. to the contrary; yet I hold the law with Prisot; upon a *nient dedire*, and a

nihil

49 E. 3. 23.
50 E. 3. 7.
47 E. 3. 13.
See the first part
of the Institutes,
sect. 675.
4 E. 2. Cui in vi-
ta. 20. F.N.B.
193. i.
36 H. 6. Fauzer
Recovery 27.
2 H. 5. 1. 7 E. 3.
15. 19 E. 3. Re-
ccit 14. 34 Aff.
p. 3. Paich.
28 E. 1.
Coram rege.
Cestria. Bract.
li. fo. 367. Fleta,
li. 5. c. 22. 7 E. 3.
62. Lib. 6. fol. 8.
Ferraers case.

* [343]

4 E. 3. 38. 39.
5 E. 3. 4. 33 E. 3.
Avowry 255.
2 E. 4. 13.
F.N.B. 156.
7 E. 3. 6.
4 E. 3. 19.
5 E. 3. 58.
See the first part
of the Institutes,
sect. 594.
Bract. li. 4.
321. b. Fleta,
li. 5. c. 34. 36.
Custumier de
Norm. cap. 10.
21 E. 4. 65.
22 E. 4. 30.
24 H. 8.
Pleadings Br.

^a Regist. F.N.B.
19. 5.
Mich. 18 E. 1. in
banco Rot. 222.
Thomas de
Maws case.
33 H. 6. 21.
Vide 13 R. 2.
c. 17. 8 E. 2.
reccit 182.
4 E. 3. reccit 46.

^b 5 E. 2. receit
165. Sec the first
part of the Insti-
tutes, sect. 668,
669. 675.
Lib. 11. fol. 39.
Metcalles case.
12 Aff. 31.
22 E. 3. receit
139. 17 E. 2.
ibid. 173.

^c 22 Aff. 11. 22.

24 E. 3. 29.

2 H. 4. 2.

^d 10 E. 3. 27.

12 E. 3. receit

139. 14 E. 3.

ib. 139. 29 Aff.

36. 38 E. 3. 23.

3 H. 4. 18.

34 H. 6. receit

73. 22 H. 6. 1.

2 E. 4. 16.

33 H. 6. 19.

37 H. 6. 1.

3 H. 6. 58. 20.

11 H. 6. 51.

11 H. 4. 3.

3 H. 4. 13.

22 H. 6. 1.

14 H. 6. 1.

* [344]

7 H. 4. 16.

2 H. 4. 2. 7 E. 3.

32. 28 E. 91.

20 E. 3. receit

16. 22 Aff. 27.

9 E. 3. 12.

20 H. 6. 37.

First part of the

Institutes, sect.

665. 668, 669.

42 Aff. 4. 3 E. 3.

receit 47. 19 E. 3.

ib. 15. 10 E. 3.

51. 9 E. 4. 16.

† 10 E. 3. 4.

12 R. 2. receit

97. 18 E. 3.

32. 33.

* 5 E. 3. age 61.

24 E. 3. 68.

20 H. 6. 23.

10 E. 3. 27.

10 E. 3. 32. 33.

31 E. 3. receit

126. 11 E. 3.

ib. 119. 48 E. 3.

25. 2 E. 4. 27.

17 Aff. 41.

22 Aff. 13.

23 E. 3. 21.

9 E. 3. 17.

38 E. 3. 10. 11.

12 Aff. 41.

25 E. 3. 40.

14 E. 3. proce-

dendo 4. 32 E. 3.

nihil dicit the feme shall be received within the purview of this sta-
tute, 4 E. 3. receit 46.

(7) *Si uxor ante judicium venerit.*] ^b It is to be observed, First,
that the time of the receit is when judgement should be given.
2. It is to be understood *de principali judicio*, as in an admeasure-
ment of pasture judgement is given that admeasurement shall be
made, and if after admeasurement made and returned the baron
maketh default, the wife shall be received before the principall
judgement given.

^c And so in an assise of mordaunc' against the husband and wife,
if the assise be awarded by default, if after the baron make default
before the principall judgement, the wife may bee received; and
so in the assise of novel disseisin.

^d And albeit she come not at the time of the default, yet if she
come before judgement she shall be received, and so of him in the
reversion or remainder, and so if default be made at the *nisi prius*,
receit may be prayed in bank, for the justices * of *nisi prius* have no
power to allow the receit, but the safe way is to pray it there.

In an assise the husband and wife plead a record and faile thereof,
the words of an act made at this parliament, cap. 25. be, *Habeat*
pro disseisnore absque ulla recognitione, and yet the wife shall be re-
ceived in that case upon the default of her husband, for the words
be *absque ulla recognitione*, that is, of the recognitors of the assise,
and not *absque ulla receptione*, &c.

Al brieve de enquier pur waste le fem serra receive, mes apres le
waste troye sur le brieve d'enquier pur waste, el ne serra receive, car
serra inconvenient que le fem trier le matter de novel.

(8) *Parata petenti responderet.*] And in respect of this word
[*parata*] tenant by receit ought alway to appeare, for upon any
default made, judgement shall be given.

Littleton saith, that in every case that the wife is received for
default of her husband, she shall plead and have the same advan-
tage in pleading to defend her right, as if she were a fem sole
(see the first part of the Institutes, sect. 665. 668, 669). But she
cannot after receit levy a fine, for that † were not to defend, but
to give away her right, but he in the reversion that is received
may confesse the action.

* The wife after she is received shall have her age, or pray in
aide, though the words of this act be *parata petenti responderet*, that
is to be understood, that when she ought to plead by law, then she
shall be ready to plead.

The wife after she be received shall vouch and plead all man-
ner of pleas, and take all other advantages, which she and her
husband might have done, and specially such pleas, as trench to
the mischief of the warranty.

(9) *Et jus suum defendere.*] This right must be intended, which
the wife had in the lands in demaund at the time when the *præcipe*
was brought against her husband and her, and not at the time of
the receit, for if a *præcipe* be brought against her and her husband,
and after the husband and wife levy a fine, and after the husband
make default after default, albeit the wife hath no right in the
land at this time, yet may she pray to be received for the right
which she had at the time of the originall purchased, which in
judgement, and by preservation of law, as to the demandant, shall
be supposed to continue *in uno et eodem statu* in the tenancy as ten-
nant.

nant in law without any change or alteration of the estate, notwithstanding any act done by the tenant.

This also is to be understood not onely of a tenancy in deed, but also of a tenancy in law, for if the husband and wife be vowched, the wife upon the default of her husband shall be received, and yet she can have no *cui in vita* in that case according as this act limits.

The words be *jus suum defendere*, and therefore she being not to all intents a feme sole cannot confesse, nor render the action, but he in the reversion that is received may confesse, or render the action.

(10) *Eodem modo si tenens in dotem, per legem Angliæ, vel aliter ad terminum vite, vel per donum in quo reservatur reversio fecerit defaultam vel reddere voluerit, admittantur hæredes vel illi ad quos spectat reversio ad responsonem, si venerint ante judicium.*] It appeareth by Bracton who wrote before this statute, that he in the reversion should be received by the common law, for he saith, *Poterit etiam quis intrare in warrantiam, et si non vocetur ad warrantum ad proprii juris tuitionem, ut si quis tenuerit ad vitam suam, sicut mulier nomine dotis, vel alio modo, vel ad terminum terram aliquam, quæ post vitam vel terminum reversura esset ad dominum proprietatis, si se in fraudem et exheredationem ipsius permisit implacitari ab aliquo cum possit dominum proprietatis inde vocare ad warrantum ad defensionem suam, hoc omiserit; bene poterit dominus ille proprietatis, cum sibi viderit exinde periculum imminere, comparere per se, et si non vocetur, intrare in warrantiam ad sui proprii juris defensionem; cum melius et utilius sit in tempore occurrere, quam post causam vulneratam quærere remedium, et maliciis hominum obviare.*

Upon the recovery against such a particular tenant he in the reversion was driven to his writ of right, but he in the remainder was without remedy, if he never had seisin; see the first part of the Institutes.

(11) *Eodem modo.*] Though it be said here *eodem modo*, in the same manner, yet it is not in the same manner to all purposes, for the wife upon the default of her husband shall be received without shewing any cause. But so shall not he in the reversion, and therefore it is not *eodem modo* in that respect, and the reason of the diversity is, for that the feme is party to the action, and affirmed tenant by the bringing of the *præcipe*, but he in the reversion is a meere stranger to the action, and therefore ought to shew cause how the reversion is in him.

But as to age, he in the reversion shall have the same in the same manner, as the wife shall have it, the demandant shall count of new against the wife that is received, and *eodem modo* against them in reversion or remainder.

(12) *Si tenens in dotem vel aliter ad terminum vite.*] In a writ brought against a feme gardein in chivalry and her husband, the wife shall not be received for the default of her husband, for it is out of the words of the statute, and the husband hath power to alien, or lose the chattell.

(13) *Vel per donum.*] This is to be understood of a tenancy in taile, *apres possibilité de issue extinct*, and not of an estate in taile generall or speciall, for upon an estate in taile no receipt is given by this act, because it is an inheritance which may continue for ever.

(14) *Ad-*

Quar. Imp. 2.
9 E. 4. 16.
5 E. 2. receipt 62.
8 E. 2. ib. 181,
182, 183.
19 E. 2. ib. 176.
7 E. 3. 44.
43 E. 3. 23. b.
31 E. 1. receipt
186. 9 H. 5. 10.
10 E. 3. 4.
12 R. 2. receipt
97. 18 E. 3.
32. 33.
See the first part
of the Institutes,
sect. 302.

Bracton, lib. 5.
f. 393. b. nu. 14.
[345]

See the first part
of the Institutes,
sect. 481, 482.
28 E. 3. 90.
12 E. 3. issue 25.
22 E. 3. ib. 20.
10 E. 3. 10. 4 H. 6.
5. 8 H. 16.
21 H. 6. 13.
32 H. 6. 12.
33 H. 6. 39. 41.
9 H. 5. 3.
8 E. 3. 39.
18 E. 3. 32.
3 H. 6. 41.
21 H. 6. 42.
21 Aff. 17.
21 E. 3. 45.
33 H. 6. 52.
15 E. 3. receipt
122, 123.
19 E. 2. ib. 179.
8 E. 2. ib. 170.
32 Aff.
9 E. 4. 16.
2 E. 2. receipt
147. 5 E. 2. ib.
161. 11 H. 4. 13.
39 E. 3. 18.
42 E. 3. 12.
20 E. 3. receipt
17. 16 E. 2. ib.
104. 33 H. 6.
22. l. 10. fo. 44.
Jenings case.
Regist. 135.

* 2 E. 2. receipt
147. 20 E. 3. receipt 17.

8 E. 3. 3.

45 E. 3. 19.

23 H. 6. receipt

156. 5 E. 3. 61.

6 E. 3. 14.

15 E. 3. receipt

124. 5 H. 5. 11.

11 E. 3. receipt

117. 10 H. 6. 24.

28 E. 3. 98.

33 H. 6. 52.

41 E. 3. 8.

22 H. 6. 1.

19 H. 6. 46.

40 E. 3. 12.

4 E. 2. receipt

167. 18 E. 3. 13.

23 E. 3. tit.

receipt 156.

4 E. 4. 14.

18 E. 4. 25, 27.

5 H. 4. 2.

32 H. 6. 12.

7 E. 3. 15.

18 E. 3. 13, 47.

16 H. 7. 5.

[346]

b 32 E. 1. receipt

185. 9 E. 4. 40.

10 E. 4. 9.

13 E. 3. receipt

17 E. 2. ib. 175.

24 E. 3. 33, 35.

4 E. 2. receipt

160. 13 E. 3. ib.

145. 19 E. 3. ib.

111. 14 E. 3.

mans. des faits

6. 29 E. 3. 48.

Rot. Parliam.

29 E. 3. nu.

11 H. 4. 15.

4 E. 3. 38.

25 E. 3. 47.

c 11 E. 3. receipt

118. 4 E. 3. ib.

160. 18 E. 2. ib.

174. 18 E. 3. 12.

42 E. 3. 12. b.

24 E. 3. 32.

Lib. 10. fol. 44.

Jenings case.

d 13 R. 2. c. 17.

6 E. 3. 16. 4 E.

receipt 4. 22 E. 3.

10. 1 H. 6. 4.

2 H. 6. 14.

20 E. 3. receipt

18, 19.

e 4 E. 3. receipt 46.

19 E. 2. ib. 184.

158. 6 E. 2. ib.

168. 14 E. 3. ib.

236. 19 E. ib.

114. F.N.B.

155. b

(14) *Admittantur hæredes.*] * By colour of these words, the heir apparent of tenant in tail making default, &c. hath been admitted, *sed non est lex, quia nullus est hæres viventis.*

(15) *Ad quos spectat reversion.*] He must have a reversion, and not only a condition or possibility.

A wife being tenant for life is received upon the default of her husband, and after makes default, he in the reversion shall be received; and so note a receipt upon a receipt; and so if a baron and feme be received, and after the baron make default, the feme shall be received.

If an infant make a lease for life, though the lease be defeasible, yet upon the default of the lessee, he shall be received, and so it is of a lease by baron and feme.

One may be received by attorney by a special writ affirming infirmity, and the words of the statute are general.

In a *præcipe* the tenant maketh default, &c. he in the reversion prayeth to be received, and sheweth that he let the land to the tenant and another for life, and the demandant was driven to maintain his writ.

If tenant for life pray in aide of him in reversion, and he refuse to joyne, and after tenant for life maketh default, &c. he in reversion shall not be received, because he refused to joyne, but if he had joynd, and after the tenant make default, he should have been received.

Regularly for a reversion created hanging the writ there shall be no receipt: but if the lessee make the writ good, there shall be a receipt: as if a *præcipe* be brought against B. that hath nothing, and the terre-tenant make a lease for life to B. he shall be received.

a If tenant for life be impleaded, and surrender hanging the writ to him in reversion, he shall be received, and yet he hath no reversion in him, *et sic in similibus.*

b If a rent be demanded against tenant for life, he in the reversion or remainder shall be received by the equity of this statute; albeit the words be, *ad quos spectat reversion*, yet he in the remainder upon default of tenant for life, shall be received, for he is in the same mischiese.

The king shall not be received, for he cannot become tenant, nor be *in loco tenentis*. 4 E. 3. 38. 25 E. 3. 47.

c It is not necessary, that he that prayeth to be received hath the immediate reversion; for if a lease for life be made, the remainder for life, he in the reversion shall be received; so it is where the reversion is graunted for life, he in the reversion in fee may be received: but if he that hath the meane estate, and he in the reversion or remainder in fee pray to be received at one time, he that hath the immediate particular estate, in respect of the proximity shall be received, but if he be received and make default, he in the reversion in fee shall not be received.

(16) *Fecerit defaultum vel reddere voluerit.*] d *Feynt pleder* was not (as hath been said) within this act, but is remedied by a later statute, in case of him in reversion.

e But a *nient-dedire*, and a *nihil dicit* are (as hath been said) within the purview of this act, both for him in the reversion, and the wife also, for they are in equall mischiese.

If

If the appearance of the tenant be recorded, and after he depart in despite of the court, he in the reversion shall be received, for judgement is to be given upon the default.

(17) *Ad responſionem.*] ^f That is, when the time come when by law he ought to answer, and therefore he shall have his age, or pray in aide, &c.

^g *Vide statut. de anno 20 E. 1.* where he that prayeth to be received, before his receipt shall finde surety, &c. and the statute of 13 R. 2. cap. 17. to that purpose, but those statutes extend not to a feme, that is to be received in default of her husband, because she is party to the writ, but to him in the reversion or remainder, that is a stranger to the writ, *et venit a latere.*

(18) ^h *Post mortem hujusmodi tenentium recuperare per breve de gressu, &c.*] This is understood of a writ of entry *ad communem legem*, which is a speedier remedy, then a writ of right, and the demandant shall count upon a demise according to the writ and usuall forme, and if the tenant traverse the demise, the demandant shall maintain his count by the recovery by default.

(19) *Et sic in casibus prædictis duæ concurrunt actiones.*] For in these cases the tenant shall shew his right according to the forme of the writ, whereupon he recovered, even as the tenant shall doe in the *cui in vita*, upon the former part of this act, and therefore this branch saith, *Duæ concurrunt actiones, viz.* the writ of entry upon this action, and the former writ, whereupon the recovery was by default.

^f 19 E. 3. receipt 1.
5 E. 2. ib. 163.

^g 9 H. 5. 10.
48 E. 3. 13.
29 E. 3. 48.
34 E. 3. receipt
190. 11 E. 3. ib.
117. 19 E. 3. ib.
112. 6 R. 2.
ibid. 94.

^h Vet. N.B. 136.
Regist. 235.

Regist. ubi supra.

CAP. IV.

[347]

IN casu quando vir implacitatus

(1) *de tenemento reddit tenementum peritum adversario suo de plano, post mortem viri, justiciarii adjudicent mulieri dotem suam, si per breve petat. Sed in casu quando vir amittet per defaultam tenementum petitum, si mulier post mortem viri petat dotem, et compertum est, quod per aliquos justiciarios adjudicata fuit dos mulieri petenti, non obstante defaulta, quam vir suus fecit, aliis justiciariis in contraria opinione existentibus, et contrarium judicantibus, ut de cætero hujusmodi ambiguitas amputetur, et sit in certo: ordinatum est quod in utroque casu audiat mulier, quæ dotem petit. Et si excipiat contra ipsam, quod vir suus tenementum, unde dos petita est, amisit per judicium, per quod dotem habere non debet, et si quærat per quod judicium,*

IN case where the husband, being impleaded for land, giveth up the land demanded unto his adversary by covin; after the death of the husband, the justices shall award the wife her dower, if it be demanded by writ. But in case where the husband loseth the land in demand by default, if the wife, after the death of her husband, demandeth her dower, it hath been proved, that some justices have awarded unto the woman her dower notwithstanding the default which her husband made, other justices being of the contrary opinion, and judging otherwise. To the intent that from henceforth such ambiguity shall be taken away, it is thus ordained in certain, that in both cases the woman demanding her dower shall be heard. And if it be alledged against her, that

dictum, et compertum fuerit quod per defaultam, ad quod tenens necesse habet respondere, tunc oportet tenentem ulterius respondere, et ostendere quod ipse tenens jus habuit, et habet in prædicto tenemento, secundum formam brevis, quod tenens prius super virum impetavit. Et si ostendere poterit, quod vir mulieris non habet jus in tenement', nec aliquis alius quam ipse qui tenet: recedat quietus, et uxor nihil capiat de dote. Quod si ostendere non poterit, recuperet mulier dotem suam. Et sic in casibus istis, et in quibusdam casibus subsequen'. s. quando uxor dotata amittat dotem (3) suam per defaultam (4), et tenentes in libero maritagio per legem Angliæ, vel ad terminum vitæ, vel per feudum talliatum, concurrunt plures actiones (2). Quia hujusmodi tenentes, cum oporteat eos petere tenementa sua per defaultam amissa (9), et cum ad hoc pervent' fuerit, quod tenens necesse habeat (6) ostendere jus suum, non possunt ipsi, sine his (7) ad quos spectat reversio, de jure respondere: et ideo concedatur eis, quod vocent ad warrant' secundum tenorem brevis, ac si essent tenentes in priori brevi (8) warrant' habeant (5). Et cum warrantus warrantizaverit, procedat placit' inter illum qui seiscitus est et warrantum, secundum tenorem brevis, quod tenens prius impetavit, et per quod recuperavit per defaultam. Et

[348] *si ex pluribus actionibus ad ultimum perveniat ad unum iudicium, videlicet ad hoc quod hujusmodi petentes recuperent petitionem suam, vel quod tenentes eant quieti. Et si actio hujusmodi tenentis, qui necesse habet ostendere jus suum, mota fuerit per breve de recto, licet magna assisa, vel duellum jungi non possunt per verba consueta, jungi tamen possunt per verba satis apta. Quia cum tenens in hoc quod ostendat jus suum, quod ei competet per breve quod prius impetavit et sit loco actoris, bene poterit*

that her husband lost the land, whereof the dower is demanded by judgement, whereby she ought not to have dower, and then it be enquired by what judgement, and it be found that it was by default, whereunto the tenant must answer; then it behoveth the tenant to answer further, and to shew that he had right, and hath in the foresaid land, according to the form of the writ that the tenant before purchased against the husband. And if he can shew that the husband of such wife had no right in the lands, nor any other but he that holdeth them, the tenant shall go quit, and the wife shall recover nothing of her dower; which thing if he cannot shew, the wife shall recover her dower. And so in these cases, and in certain other following, that is to say, when the wife being endowed loseth her dower by default, and tenants in free marriage, by the law of England, or for term of life, or in feetail, divers actions do concur for such tenants, when they must demand their land lost by default: and when it is come to that point, that the tenants must be compelled to shew their right, they cannot make answer without them to whom the reversion of right belongeth; therefore it is granted unto them to vouch to warranty, as if they were tenants, if they have a warranty. And when the warrantor hath warranted, the plea shall pass between him that is seised and the warrantor, according to the tenor of the writ that the tenant purchased before, and by which he recovered by default; and so from many actions at length they shall resort to one judgement, which is this, that the demandants shall recover their demand, or the tenants shall go quit. And if the action of such a tenant, which is compelled to shew his right, be moved by a writ of right, though that the great assise or battail cannot be joyned

terit warranti defendere jus tenentis, qui loco petentis (ut dictum est) habet, et seisinam antecessoris sui offerre et defendere per corpus liberi hominis sui, vel ponere se in magnam assisam, et petere inde recognitionem fieri, utrum ipse majus jus habeat in tenemento petito, an prædictus talis: vel alio modo jungi poterit magna assisa, et sic talis warrantus defendit jus, &c. Et cognoscit seisinam antecessoris sui et ponit se in magnam assisam, &c. et petit recognitionem fieri, utrum ipse majus jus habeat in prædicto tenemento, ut in illo de quo feoffavit talem, vel quod talis remisit, et quietam clamavit, &c. an prædictus talis, &c. Cum aliquando contingat (10), quod mulier non habens jus petendi dotem hæreditatis hæredis alicujus infra ætatem existens, impetret breve de dote super custodem, et custos per favorem mulieri dotem reddiderit, vel defaultam fecerit, vel placitum ita fictum per collusionem defenderit, per quod dos hujusmodi mulieri (in præjudicium hæredis) adjudicata fuerit: provisum est quod hæres, cum ad ætatem pervenerit, habeat actionem petendi seisinam antecessoris sui versus hujusmodi mulierem, qualem haberet versus quemcunque alium deforciatorem, ita tamen quod salva sit mulieri versus petentem exceptio ostendendi, quod jus habet in dote sua, quod si ostendere poterit, recedat quietas, et dotem suam retineat, et sit hæres in misericordia, et amercietur graviter secundum discretionem justiciariorum. Sin autem recuperet hæres petitionem suam. Eodem modo subvenietur mulieri, si hæres vel alius eam implacitaverit de dote sua, si dotem suam per defaultam amiserit. In quo casu sua defaulta non sit ei ita præjudicialis, quin dotem suam (si jus habeat) recuperare possit, et fiat ei tale breve:

joyned by the words accustomed, yet it shall be joyned by words convenient; for when the tenant, in that he sheweth his right which belongeth to him by the writ that he before purchased, instead of a demandant, the warrantor may well defend the right of the tenant, which is accounted in place of the demandant, as before is said, and offer to defend the seisin of his ancestors by the body of his freeman, or put himself in the great assise, and pray recognizance to be made, whether he hath more right to the land in demand, or else the party before named. Or otherwise the great assise may be joyned thus, *talis defendit jus*, &c. and so the warrantor may defend the right, and knowledge the seisin of his ancestor, and put himself in the great assise, &c. and pray recognizance to be made, whether he hath more right in the foresaid land, as in that whereof he infeoffed such a man, or that such a one released and quit claimed, &c. or else the foresaid party, &c. And where sometime it chanceth that a woman not having right to demand dower, the heir being within age, doth purchase a writ of dower against a guardian, and the guardian endoweth the woman by favour, or maketh default, or by collusion defendeth the plea so faintly, whereby the woman is awarded her dower in prejudice of the heir; it is provided, that the heir, when he cometh to full age, shall have an action to demand the seisin of his ancestor against such a woman, like as he should have against any other deforceor; yet so, that the woman shall have her exception saved against the demandant, to shew that she had right to her dower, which if she can shew, she shall go quit and retain her dower, and the heir shall be grievously amerced, according to the discretion of the justices; and

if not, the heir shall recover his demand, &c. In like manner the woman shall be aided, if the heir or any other do implead her for her dower, or if she lose her dower by default, in which case the default shall not be so prejudicial to her, but that she shall recover her dower, if she have right thereto, and she shall have this writ:

*Præcipe A. quod juste * (11), &c. reddat tali, quæ fuit uxor talis tantam terram cum pertinentiis in C. quam clamat esse rationabilem dotem suam, vel de rationabili dote sua, et quam prædictus talis ei deforceat.*

Et ad istud breve habeat tenens exceptionem suam, ad ostendendum, quod mulier jus non habet in dote (12). Quod si verificare poterit, recedat quietus, alioquin recuperet mulier tenementum, quod prius tenuit in dote. Et cum temporibus retroactis aliquis amisisset terram suam per defaultam, non habuit aliud recuperare quam per breve de recto, quod eis competere non potuit, qui de mero jure loqui non potuerunt, veluti tenentes ad terminum vitæ, vel per liberum maritagium, vel per secundum talliatum, in quibus casibus salvatur reversio (13). Provisum est quod de cætero non sit eorum defaulta eis ita præjudicialis, quin statum suum (si jus habeant) recuperare possint per aliud breve quam per breve de recto. De maritagio amisso per defaultam fiat tale breve:

Præcipe A. quod juste (11), &c. reddat B. manerium de C. cum pertinentiis, quod clamat esse jus et maritagium suum, et quod prædictus A. ei deforceat.

Eodem modo de tenemento ad terminum vitæ per defaultam amisso, fiat tale breve:

Præcipe A. quod juste, &c. reddat B. manerium de C. cum pertinentiis, quod clamat tenere ad terminum vitæ suæ, et quod prædictus A. ei deforceat.

And to this writ the tenant shall have his exception, to shew that she had no right to be endowed; which if he can verify, he shall go quit; if not, the woman shall recover the land whereof she was endowed before. And whereas before time, if a man had lost his land by default, he had none other recovery than by a writ of right, which was not maintainable by any that could not claim of meer right, as tenants for term of life, in free marriage, or in tail, in which estates a reversion is reserved; it is provided, that from henceforth their default shall not be so prejudicial, but that they may recover their estate by another writ than by a writ of right, if they have right. For land in free marriage, lost by default, such a writ shall be made:

Likewise of land for term of life, lost by default, this writ shall be made:

Similiter,

Similiter,

Quod clamat tenere sibi et hæredibus suis de corpore suo legitimè procreatis, et quod prædictus A. ei deforceat, &c.

(14 H. 4. f. 31. 50 Ed. 3. f. 7. Fitz. Dower, 80. 140. 173. Fitz. Voucher, 46. 59. 159. 165. 186. 261. 275. 276. 300. 11 Rep. 62. Hob. 299. 6 Rep. 8. 1. Inf. 131. b. 354. b. 355. a. 356. a. Fitz. Quod ei deforceat, 1, 2, 3, 4, 5, 6. 8, 9, 10, 11, 12, 13. 17. Cro. Car. 445. F.N.B. 155. b. Regist. 171. b. 230. Raft. 491.)

(1) *In casu quando vir implacitatus, &c.*] It appeareth by the preamble of this statute, that if a recovery had been in a reall action against the husband, and the husband did render the land to the demandant, that notwithstanding this recovery, the wife should recover her dower. But if the husband had lost by default, it was a question and a doubt, whether in that case she should recover or no; and some judges would give judgement for the woman, and some were in a contrary opinion. Here is to be noted, that a recovery by reddition of the husband, is not of so great account in law as a recovery against the husband by default: but therein before this act this diversity was holden for law, that if in a writ of dower the tenant did plead the recovery in barre, the demandant might reply, *Que ceo fuit per fraud, ou per collusion, ou per gree le baron*, as Britton saith, who wrote before this statute; but if it were by default without covin, then the greater opinion was, it barred the feme.

But the reddition of the husband was holden for clear law, as it was adjudged the yeer before the making of this act, for that the wife was ready to maintain the title of her husband.

All this is to be understood, where he that recovereth hath no right, for where he that recovered either by reddition or default had right, there neither the common law, nor this statute extended thereunto.

If the recovery he had by verdict, the feme shall not falsifie in the point tryed, but she may say, that he might have pleaded a better plea, or confesse and avoid the recovery.

(2) *Quando uxor dotata amittat dotem suam per * defaultam, et tenentes in libero maritagio per legem Angliæ, vel ad terminum vitæ, vel per feodum talliat, concurrunt plures actiones, &c.*] By this act the writ of *quod ei deforceat* is given; at the common law there lay no writ of *quod ei deforceat*, but by custome there did, as in Wales.

If tenant in dower, tenant by the courtesie, or tenant for life had lost by default, they were without remedy, because they could not have a writ of right. Another mischief was, that seeing by the first chapter of this parliament it did alter the estate of tenant in frank-mariage, and tenant to them and the heirs of their bodies, &c. from a fee-simple to an estate tail, whereupon a reversion in point of state was in the donor expectant; by reason whereof, if a recovery by default had been against tenant in frank-mariage, or other tenant in tail, they had been also without remedy, because their estate being so changed, they could not have a writ of right no more then the other tenants for life here recited could have; therefore by this act a *quod ei deforceat* is given to them all, whereby it appeareth, that (as hath been said) the makers of the act intended a change of the estate tail, and providently made provision for tenant in tail by this act.

Brit. c. 109. fol. 261. Fleta, lib. 5. cap. 22.

12 E. 1. dower 173. 49 E. 3. 23. 12 H. 4. 21.

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36 H. 6. Fauver de recovery 27.

47 E. 3. 13.
50 E. 3. 7.
36 H. 6. ubi sup.
14 H. 4. 32.
4 E. 3. 52. 53.
* Customier de Norm. cap. 28. fol. 56.

2 E. 4. 13.
33 H. 6. 46.
4 H. 7. 2. Lib. 5. fo. 85. li. 3. fo. 9.
See the first part of the Institutes, 481, 482. 674, 675.

4 E. 3. 38. 5 E. 3.
4. 8 33 E. 3.
Avowry 255.
29 E. 3. 47.
41 E. 3. 30.
2 E. 4. 17.
F.N.B. 156. a. c.

It is agreed, that if a recovery by default be had against the husband and wife, tenants in frank marriage, or tenants for term of their lives, that they shall have a *quod ei desorceat* upon this act; but it is holden in some books, that if the husband and the wife be seised, as in the right of the wife, for term of her life, and a recovery be had against them by default, that they shall not have a *quod ei desorceat* for three reasons:

1. That the husband is not within the words of the statute, for he is not tenant for life, but seised in the right of his wife, who is tenant for life.

2. That the husband may dispose of his wives estate, and alien the same during his life.

3. Provision is made by the next precedent chapter, that the wife in this case may have a *cui in vita* after the decease of her husband.

But I take it that in this case, if the recovery be had merely by default without the agreement of the husband, that the husband and wife may have a *quod ei desorceat* by this act; for as to the first reason, though the husband be seised but in the right of his wife, yet the wife is tenant for life, and the husband is named but for conformity.

And if a lease be made to a feme sole, and she taketh husband, and a recovery be had by default against them, they shall have a *quod ei desorceat* by this act.

As to the second reason, the same may be said, when the husband and wife are donces in frank-marriage, or joyntenants for life; for in these cases the husband may dispose of the lands during his life.

And as to the last reason, this statute intended to give to the tenants for life a present remedy to relieve themselves, as in this case the husband and wife may during the life of the husband; for it is agreed, that after the death of the husband the wife shall have a *quod ei desorceat*.

But if the recovery be had by the agreement of the husband, then he can never bring a *quod ei desorceat*.

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20 E. 4. 2.

(3) *Amittat detem, &c.*] This statute doth also extend to courts that be not of record, as the court baron, as in a writ of right in a court baron, &c.

(4) *Per defaultam.*] If A. and B. be seised of lands, and to the heirs of A. a recovery is had against them by default, A. shall have a writ of right of his moiety, and B. a *quod ei desorceat* upon this statute, and when they recover they shall be joyntenants again.

a Two coparceners in taile lose by default, they shall joine in a *quod ei desorceat*, yet the default of the one is not the default of the other: b but if tenant in taile lose by default, &c. and die, the issue in taile shall not have a *quod ei desorceat* but a formedon in the descender.

c A departure in despight of the court (unlesse it be in a writ of right after the mise joyned) is holden to be within this act, for he makes default in that case when he is demanded; but upon a *nihil dicit*, no *quod ei desorceat* doth lie.

d A tenant for term of life makes default in a *præcipe*, whereupon he in the reversion is received and plead to issue, and it is found against the tenant by receipt, and judgement is given for the demandant,

See the first part
of the Institutes,
feA. 674, 675.
46 E. 3. 21.
2 46 E. 3. 21.
F.N.B. 155. h.
b 14 H. 7. 5. b.
F.N.B. 155. f.
5 H. 7. *Quod ei*
desorc 9.
c 15 E. 2. *Quod*
ei desorc 9.
F.N.B. 155. i.
Pasch. 33 Eliz.
Rot. 1125. in
Banco Elimers
case.
d 33 E. 3. *Quod*
ei desorc 17.
F.N.B. 155. c.
49 E. 3. 8. 2 H. 4.
2. 21 H. 6. 56.
9 E. 4. 16.

demandant, the tenant shall have a *quod ei desorceat*, for albeit there is a verdict given, yet the judgement is given upon the default.

But in an assise, and in an action of waste, although the tenant make default, yet there is a verdict given, and upon that verdict the judgement is given in both cases, and therefore there no *quod ei desorceat* doth lie within this act.

A woman brings a writ of dower against tenant for life, and recover by default, the tenant brings a *quod ei desorceat*, and recover by default, the tenant in dower shall have a *quod ei desorceat* by this statute: and so note a *quod ei desorceat* upon a *quod ei desorceat*. 13 E. 1. vowches 286.

If the tenant for life in a *præcipe* vouch, and the vouches will not appeare, by reason whereof the tenant loseth by default, he shall have a *quod ei desorceat* by this act, albeit the judgement is not given for the proper default of the tenant, for this statute saith, *per defaultam* generally, and not *per defaultam suam*. F.N.B. 156. b.

(5) *Cum ad hoc perwentum fuerit, quod tenens necesse habet ostendere ius suum, non possunt ipsi sine hiis ad quod spectat reuersio de iure respondere: et ideo concedatur eis quod vocent ad warrantum secundum tenorem brevis ac si essent tenentes in priori brevi, warrantum habeant.*] For the better understanding whereof the forme and order of the entry of the record and pleading (a window which letteth in light to many cases) is herein to be known, which is, that in the *quod ei desorceat*, the demandant count that he or she was seised of the land for terme of life, or in tail, without shewing of whose lease or gift, for that the action is brought of his owne possession, and alledgeth the esple in himselfe, and that the defendant hath desorced him without making of any mention of the record. And then the tenant may defend the right of the demandant, &c. and either shew how he recovered against the demandant by formedon or other reall action, and in the purclose of his plea shall say, that *ipse paratus est ad manutenendum ius et titulum suum prædictum per donum prædictum, &c. unde petit iudicium*, whereby the defendant in the *quod ei desorceat* is become actor, and in effect reviveth the former action, and the demandant in the *quod ei desorceat* is become in manner of a tenant to the former action, and may vouch as if he were tenant to the former action, because if he hath but an estate for life, it is not safe for him to plead in chiefe, but to vouch him in the reversion, therefore he can vouch no other, but him in the reversion; or if the defendant notwithstanding upon the title of the former recovery plead some other barre, then the demandant in the *quod ei desorceat* shall not vouch at all, because the former action is not revived. And if the defendant plead the former recovery, the demandant may traverse the title, or plead any thing in barre of the title. 29 E. 3. 47.
10 E. 4. 2.
F.N.B. 156. d.
9 E. 3. 22.
41 E. 3. 30.
48 E. 3. 8.
2 E. 4. 11.

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(6) *Quod tenens necesse habet.*] It is not of necessity that the defendant in the writ of *quod ei desorceat*, doe plead the former recovery, but (as hath been said) he may plead any other barre.

(7) *Non possunt ipsi sine hiis, &c.*] By these words the demandant in the *quod ei desorceat* after the recovery pleaded cannot vouch any other but him in the reversion. 9 E. 3. 22.
33 E. 3. Count
Pl. de vouch.
101. 33 H. 6.
46. Lib. 11.
fol. 62. D. Fof-
ters cale.

(8) *Concedatur iis quod vocent ad warrantum, &c. ac si essent tenentes in priori brevi.*] Upon these words, two conclusions are to be observed.

First, that albeit the demandant in the *quod ei desorceat* after the recovery pleaded cannot vouch, yet the *quod ei desorceat* may be maintainable.

Secondly, if the recovery by default be in such an action where no voucher doth lie, yet the *quod ei desorceat* is maintainable, and these words are to be intended, that such tenant shall vouch which might have vouched in the first writ.

And therefore if the judgement by default be in a *scire facias* brought upon a recovery or fine, or in a writ of entry, or in the *quibus* brought against the disseisor himselfe, there lieth no voucher, and yet a *quod ei desorceat* is given by this act upon such a recovery by default. And where the vouchere should not have his age in the former writ, hee shall not have his age in this writ, for this writ is of the nature of the other.

The tenant in a *quod ei desorceat* may vouch, &c. and so both tenant and demandant (as hath been said) may vouch in this act, seeing the statute doth give a voucher, by consequence he shall recover in value.

But note this act doth give but one voucher, and therefore the vouchere shall not vouch over, and sir William Herle said, that they were *sages gens queux fieront cest statut*.

(9) *Cum oportet eos petere tenementa per defaultam amissa.*] Hereupon it is holden, that he that lost by default may have a *quod ei desorceat* against the alienee of the recoveror, because the words of the statute are indefinite; and unlesse the writ did lie against the alienee, the demandant could not have the effect of his suit, viz. the restitution of the land.

See the first part of the Institutes, sect. 674, 675.

(10) *Cum aliquando contingat.*] By the purview of this statute, if the wife having no right to be endowed, bring a writ of dower against the gardien in chivalry, and by favour the gardein in chivalry doe yeeld dower, or make default, or plead faintly, by means whereof the wife recovereth her dower in prejudice of the heire, the heire after he commeth to his full age shall have a writ of mordaunc against the wife, as he might have against any other desorceour.

See the Statute
of Marlb. c. 16.

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See before cap. I.
Formedon.

Regist. 171.

(11) *Præcipe A. quod iuste, &c.*] Here the forme of the writ of *quod ei desorceat* for tenant in dower is set down, and it is so called, because of these words in the writ, *quod ei desorceat*, and seeing the forme of the writ is here expressed, the statute that giveth the writ needs not to be recited, as before hath been said.

Note in none of these writs it is said *injuste desorceat* (as commonly in writs it is) because this act giveth the forme, and *injuste* is not in the statute.

(12) *Quod mulier jus non habet in dote.*] Note, this is a good barre in a *quod ei desorceat*.

(13) *Non habuit aliquod recuperare quam per breve de recto, quod eis competere non potuit qui de viro jure competere non potuerunt veluti tenentes ad terminum vite vel liberum maritadium, vel per feodum talitatum, in quibus casibus salvatur reversio.*] Upon these words foure things are to be observed,

1. First, that none shall have a writ of right, but he that hath a fee-simple, here called *merum jus*.

2. That tenants in taile cannot have a writ of right.

3. This

3. This is an exposition of the first chapter of this parliament, that thereby the estate taile is of an estate in fee-simple become a divided and particular estate, whereupon the reversion in fee is expectant.

4. Fourthly, albeit tenant by the curtesie be not expressly named in these former writs, yet is he within the mischief and purview of this statute, for he is *tenens ad terminum vite*. Regist. 171. b.

C A P. V.

CUM de advocacionibus ecclesiarum non sint nisi tria brevía originalia videlicet breve de recto, et duo de possessione, sciz. ultimæ præsentationis, et quare impedit (1), et hucusq; usitatum fuerit in regno, quod cum aliquis jus præsentandi non habens (4) præsentaverit (3) ad aliquam ecclesiam (5), cujus præsentatus sit admittus (6), ipse qui verus est patronus per nullum aliud breve recuperare potuit advocacionem suam (2), quam per breve de recto (7) quod habet terminare per duellum, vel per magnam assisam, per quod hæredes infra ætatem existentes per fraudem et negligentiam custodum, hæredes etiam sive majores, sive minores per negligentiam vel fraudem tenentium per legem Angliæ, vel mulierum tenentium in dote, vel alio modo ad terminum vite, vel annorum, vel per feudum talliatum, multotiens exheredationem patiebantur de advocacionibus illis, vel ad minus (quod eis melius fuit) ponebantur ad breve de recto, et in casu omnino exheredati fuerunt hucusque: statutum est quod hujusmodi præsentationes (8) non sint hujusmodi rectis hæredibus (9), aut illis ad quos post mortem aliquorum, hujusmodi (11) advocaciones reverti debent (10) ita præjudiciales, quin quotiescunque aliquis jus non habens, tempore hujusmodi custodiarum præsentaverit, vel tempore tenentium in dote, per legem Angliæ, vel alio modo, ad terminum vite, vel annorum (12), vel

WHEREAS of advowsons of churches there be but three original writs, that is to say, one writ of right, and two of possession, which be darrein presentment, and quare impedit; and hitherto it hath been used in the realm, that when any having no right to present, had presented to any church, whose clerk was admitted, he that was very patron could not recover his advowson, but only by a writ of right, which should be tried by battail or by great assise, whereby heirs within age, by fraud, or else by negligence of their wardens, and heirs both of great and mean estate, by negligence or fraud of tenants by the courtesie, women tenants in dower, or otherwise, for term of life, or for years, or in fee-tail, were many times disherited of their advowsons, or at least (which was the better for them) were driven to their writ of right, in which case hitherto they were utterly disinherited; it is provided, that such presentments shall not be so prejudicial to the right heirs, or to them unto whom such advowsons ought to revert after the death of any persons: for as often as any, having no right, doth present during the time that such heirs are in ward, or during the estates of tenants in dower, by the courtesie, or otherwise for term of life, or of years, or in tail; at the next avoidance, when the heir is come to full age, or when after the death of the tenants before named the advow-

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per fecdum talliatum (13), in proxima vacatione, postquam hæres ad ætatem pervenerit (14), vel advocatio post mortem tenentium in forma prædicta ad hæredem pleræ ætatis existentem re-vertitur, habeat eandem actionem et recuperationem per breve de advoca-tione possessorium (15), qualem haberet ultimus antecessor (16) 'ujusmodi hæ-redis plenam habens ætatem, in ultima vacatione tempor' suo accidente, ante mortem suam, vel antequam dimissio facta fuerit ad terminum vel ad fecdum talliatum (17), ut prædictum est. Hoc idem observetur de præsentationibus factis ad ecclesias de hæreditate uxorum (18), tempore quo fuerunt sub potestate virorum suorum, quibus per istud sta-tutum subveniatur, per remedium su-prædictum. Viris etiam religiosis (19), episcopis, archidiaconis, rectoribus eccle-siarum, et aliis personis ecclesiasticis per istud idem statutum subveniatur: si ali-quis jus præsentandi non habens præ-sentaverit ad ecclesias domus sive præ-latiæ, dignitati aut personatui spectan-tes, tempore quo vacaverint prælatiæ, dignitates, aut personatus hujusmodi. Nec tamen ita large intelligatur istud statutum, quod personæ, ad quorum re-medium statutum istud est editum, ha-beant recuperare supradictum, dicentes quod custodes, tenentes in dotem, per legem Angliæ, vel alias ad terminum vitæ, vel annorum, vel viri fiste de-fenderint (20) placitum per ipsos, vel contra ipsos motum, quia judicia in curia regis reddita (21) per istud sta-tutum non edrhibentur, sed stet iudicium in suo robore; quousque per iudicium curiæ regis tanquam erroneum (si error invenitur) adnulletur, vel

[355] assa ultimæ præsentationis, vel inquisitio per quare im-pedit si transierit per otinẽlam, vel per certificationem adnulletur, quæ gratis concedatur. Et de cætero una forma placitandi in brevibus ultimæ præsentationis, et quare impedit, inter iudiciarios observetur, quoad hec, quod

si pars

son shall revert unto the heir being of full age, he shall have such action by writ of advowson possessorie, as the last ancestor of such an heir should have had at the last avoidance hap-pening in his time, being of full age before his death, or before the demise was made for term of life, or in fee-tail, as before is said. The same shall be observed in presentments made unto churches, being of the inheri-tance of wives, what time they shall be under the power of their husbands, which must be aided by this estatute by the remedy aforesaid. Also reli-gious men, as bishops, archdeacons, parsons of churches, and other spiri-tual men, shall be aided by this esta-tute, in case any having no right to present do present unto churches belonging to prelaties, spiritual dig-nities, parsonages, or to houses of re-ligion, what time such houses, pre-lacies, spiritual dignities, or parsonages be vacant. Neither shall this act be so largely understanden, that such per-sons, for whose remedy this statute was ordained, shall have the recovery aforesaid, furnishing that guardians of heirs, tenants in tail, by the courtesie, tenants in dower, for term of life, or for years, or husbands, faintly have defended pleas moved by them, or against them; because the judgements given in the king's courts shall not be adnulled by this statute, the judge-ment shall stand in his force, until it be reversed in the court of the king as erroneous, if error be found; or by assise of darrein presentment, or by enquest by a writ of quare impedit, if it be passed, or be adnulled by attaint, or certification, which shall be freely granted. And from henceforth one form of pleading shall be observed among justices in writs of darrein pre-sentment and quare impedit, in this respect, if the defendant alledgeth plenarty of the church of his own pre-sentation, the plea shall not fail by rea-son

si pars rea excipiat de plenitudine ecclesie per suam propriam presentationem, non propter illam plenitudinem remaneat loquela, dummodo breve (22) infra tempus semestris (23) impetretur, quamquam infra tempus semestris presentationem suam recuperare non possit. Et cum aliquando inter plures clamantes ad vocationem alicujus ecclesie pax fuerit formata inter partes, et irrotulata coram iusticiariis in rotulo, vel in fine sub hac forma, quod unus primo presentet (24), et in sequente vacatione alius, et in tertia tertius, et sic de pluribus, si plures sint. Et cum unus presentaverit, et habuerit suam presentationem, quam habere debet per formam conventionis illius, et in proxima vacatione impediatur ille ad quem spectat sequens presentatio per aliquem qui fuit pars illius conventionis, vel loco ejus: statutum est quod de cetero non habeat hujusmodi impeditus necesse perquirere breve de quare impedit, sed habeat recursum ad rotulum, vel ad finem. Et si in rotulo, vel in fine comperta fuerit predicta pax, vel conventio, mandetur vicecomiti, quod scire faciat parti impediendi, quod sit ad aliquem brevem diem continentem spacium xv. dierum, vel trium septimanarum, secundum quod locus est propinquus vel remotus ostens. (si quid sciat dicere) quare sit impeditus talem presentationem suam habere non debeat. Et si non venerit, vel forte venerit, et nihil sciat dicere, quare sic impeditus presentationem suam habere non debeat ratione alicujus facti per pacem factam, vel irrotulatam, vel chirographatam, recuperet presentationem suam cum damnis suis. Et cum contingat quod post mortem antecessoris sui, qui ad aliquam ecclesiam presentavit personam, assignata fuerit illa advocatio in dotem alicujus mulieris, vel tenenti per legem Anglie, et tenentes in dotem, vel tenentes per legem Anglie presentaverint, et verus heres post mortem hujusmodi tenentium per legem Anglie, vel in dotem, impediatur presentare,

son of the plenarty; so that the writ be purchased within six months, though he cannot recover his presentation within the six months. And sometimes when an agreement is made between many claiming one advowson, and inrolled before the justices in the roll, or by fine, in this form, that one shall present the first time, and at the next avoidance another, and the third time another; and so of many, in case there be many. And when one hath presented, and had his presentation, which he ought to have according to the form of their agreement and fine, and at the next avoidance he to whom the second presentation belongeth, is disturbed by any that was party to the said fine, or by some other in his stead; it is provided, that from henceforth they that be so disturbed shall have no need to sue a quare impedit, but shall resort to the roll or fine; and if the said concord or agreement be found in the roll or fine, then the sheriff shall be commanded, that he give knowledge unto the disturber, that he be ready at some short day, containing the space of fifteen days, or three weeks (as the place happeneth to be near or far) for to shew if he can alledge any thing, wherefore the party that is disturbed ought not to present: and if he come not, or peradventure doth come, and can alledge nothing to bar the party of his presentation, by reason of any deed made or written since the fine was made or inrolled, he shall recover his presentation with his damages. And where it chanceth that after the death of the ancestor of him that presented his clerk unto a church, the same advowson is assigned in dower to any woman, or to tenant by the curtesie, which do present, and after the death of such tenants the very heir is disturbed to present when the church is void, it is provided, that from henceforth

*sentare, cum ecclesia vacaverit: provi-
sum est, quod de cætero sit in electione
impediti, utrum * perquirere velit per
breve de quare impedit, vel ultimæ
præsentationis (25). Hoc etiam de
cætero observetur de advocacionibus di-
missis ad terminum vitæ, vel annorum,
vel ad feodum talliatum. Et de cætero
in brevibus ultimæ præsentationis, et
quare impedit adjudicentur dampna,
videlicet, si tempus semestre transierit
per impedimentum alicujus, ita quod
episcopus ecclesiam conferat (28), et
verus patronus ea vice præsentationem
suam amittat, adjudicentur dampna
(26) ad valorem ecclesiæ (29) de duo-
bus annis. Et si tempus semestre (27)
non transierit, sed disrationetur præ-
sentatio infra tempus prædictum, tunc
adjudicentur dampna ad valorem medie-
tatis ecclesiæ per unum annum. Et si
impeditor (30) nihil habeat, unde res-
tituere possit dampna, in casu quando epis-
copus confert ecclesiæ per lapsum tempo-
ris, puniatur per prisonam duorum an-
norum. Et si advocatio disrationetur
infra tempus semestre, puniatur tamen
impeditor per prisonam dimidii anni.
Et de cætero concedantur brevina de
capellis, præbendis, vicariis, hospitali-
bus, abbatibus, prioratibus, et aliis domi-
bus quæ sunt de advocacionibus alio-
rum, quæ prius concedi non consueve-
runt (31). Et cum per breve (32)
indicavit (33), impeditur rector ali-
cujus ecclesiæ, ad petend' decimas (34)
in vicina parochia, habeat patronus
rectori sic impedit' breve ad petendum
advocationem decimarum petitarum.
Et cum disrationatum fuerit, procedat
postmodum placitum in curia christiani-
tatis, quatenus disrationatum fuerit in
curia regis (33). Cum advocatio de-
scendat participibus, licet unus his præ-
sentet, et usurpet super coheredem, non
propter hoc exclusus sit ille in toto qui
fuit negligens, sed alias habeat turnum
suum præsentandi, cum acciderit (35).*

forth it shall be in the election of the party disturbed, whether he will sue a writ of quare impedit, or of darrein presentment. The same shall be observed in advowsons demised for term of life, or years, or in fee-tail. And from henceforth in writs of quare impedit and darrein presentment, damages shall be awarded, that is to wit, if the time of six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded for two years value of the church. And if the six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year's value of the church; and if the disturber have not whereof he may recompense damages, in case where the bishop conferreth by lapse of time, he shall be punished by two years imprisonment: and if the advowson be deraigned within the half year, yet the disturber shall be punished by the imprisonment of half a year. And from henceforth writs shall be granted for chapels, prebends, vicarages, hospitals, abbeys, priories, and other houses which be of the advowsons of other men, that have not been used to be granted before. And when the parson of any church is disturbed to demand tythes in the next parish by a writ of indicavit, the patron of the parson so disturbed, shall have a writ to demand the advowson of the tythes being in demand; and when it is deraigned, then shall the plea pass in the court christian, as far forth as it is deraigned in the king's court. When an advowson descendeth unto parceners, though one present twice, and usurpeth upon his coheir, yet he that was negligent shall not be clearly barred, but another time shall have his turn to present when it falleth.

(13. Rep. 6. 1 Roll. 151. 156, 157, 158. 211. 462. St. 7 Ann. c. 18. Rast. 101. 144. 496.
3 Bull. 47. Hob. 240. Kel. 1. Fitz. Quare imp. 43. 67. 87. 52. 96. 99. 105. 127. 142. 167. 39 Ed. 3.
15. Cra.

15. Cro. El. 207. Cro. Jac. 166. 6 Rep. 61. Fitz. Quare impedit. 19. 48. 73. 96. 116. 169. Fitz. Encumbent, 1, 2. 4. Bro. Plenarty, 1, 2. 7. 11. 12. 14. 15. 16. Bro. Presentat. 46. 58. 1 Inst. 344. b. 5 Rep. 102. 13 Ed. 4. 3. Dyer, 29. Fitz. Quare impedit, 7. 49. 62. 196. Fitz. Darrein present. 11. Co. pl. 468. 479. Hob. 244. Fitz. Darrein present. 13. Regist. jud. 50. V.N.B. 25, 26. Cro. El. 31. 162. Hob. 242. Fitz. Damage, 4. 9. 17. 29. 38. 93. 106. Fitz. Quare impedit, 24. 45. Dyer, 135. 236. 241. Kel. 57. 6 Rep. 48. 2 Roll. 112. 24 Ed. 3. 26. Fitz. Quare impedit, 4. 16. 18. 27. 30. 38. 70. 82. 129. 140. 157. 183. Disturbance by Indecavit. Regist. 35. 31 H. 6. 13. Bro. Droit, 8. 7 Rep. 25. 27. 35 H. 6. 60. 38 H. 6. 9. 22 Ed. 4. 8. Fitz. Quare impedit, 1. 3. 7. 8. 20. 39. 40. 51. 58. 59. 64. 65. 69. 104. 148. 196. Hob. 238. 2 & 3 Ed. 6. c. 13.)

(1) *Cum de advocationibus ecclesiarum non sint nisi tria brevvia originalia, viz. breve de recto, et duo de possessione, scil. ultimæ præsentationis et quare impedit.*] An assise of darrein presentment no man can have, without alledging a presentment in his own time.

A writ of right of advowson a purchaser cannot have, without alledging a presentment in his own time, but a *quare impedit* a purchaser may have, and alledge a presentment in him, from whom he purchased the same; and to that end saith Britton was the *quare impedit* provided for remedy of such purchasers, but the *quare impedit* is more ancient than the time of E. 1. as appeareth by Glanville.

In 8 E. 1. it appeareth *quod sunt tria brevvia de advocatione placitabilia, breve de recto, quare impedit, et ultimæ præsentationis*; but yet the original writs of dower and cessavit, &c. do lye of an advowson, and so doth the judiciall writ of *seire facias*.

(2) *Et hucusque usitatum fuerit in regno, quod cum aliquis jus præsentandi non habens præsentaverit ad aliquam ecclesiam, cujus præsentatus sit admissus, ipse qui verus est patronus, per nullum aliud breve recuperare potuit advocationem suam, quā per breve de recto.*] For these words, *advocatio, præsentatio, ecclesia, &c.* whereof they are derived, and the severall sorts of them see the first part of the Institutes.

(3) *Præsentaverit.*] By the order of the common law, if one had presented to a church whereunto he had no right, and the bishop had admitted and instituted his clerk, this incumbent could not be removed for divers reasons.

First, for that he came into the church by a judiciall act from the bishop (who the law intended, *scrutatis archiepis, to do right*) the incumbent could not be removed, neither by writ of right of advowson, nor assise of darrein presentment, nor *quare impedit*, onely the patron should recover his advowson in a writ of right of advowson, which by the usurpation was devested from him.

Secondly, that by the common law in every town and parish there ought to be *persona idonea*, and this appeareth by the words of the writ of *quare impedit, &c. quod permittat præsentare idoneā personā, &c.* And when the bishop had admitted him able, which implied that he was *idonea persona*, then the law had his finall intention, *viz.* that the church should be sufficiently provided for, and then the church was said to be *plena et consultata*.

Thirdly, that the incumbent having *curam animarum* might the more effectually and peaceably intend so great charge, the common law provided, that after institution he should not be subject to any action, to be removed at the suit of any common person, without all respect of age, coverture, imprisonment or non-sane memory, and without regard of title, either by descent or purchase, or of any estate; wherein you may (as often it hath been) observe what inconveniences

Brit. c. 94. fol. 233. Braet. li. 4. 246, 247. Fleta, li. 5. c. 12, 13, 14, 15, 16. Glan. lib. 6. ca. 17. li. 13. cap. 20, 21.

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Tr. 8 E. 1 Rot. 26. Coram Rege. Braet. li. 4. fo. 246, 247. Fleta, li. 5. c. 17. 7 E. 3. 27. 43 E. 3. 15. 14 E. 2. Quare imp. 172. See the first part of the Institutes, sect. 10. 180. 184. 643, 644, 645, 646, 647, 648. See li. 6. fo. 50. Boswells case. Bro. tit. f. present. at eglise 46. 6 E. 3. 38, 39. See the first part of the Institutes, sect. 648.

1.

2.

Regist. F.N.B. 36.

3.
Braet. li. 4. fo. 244. 35 E. 1. Quare imp. 180. 1 E. 2. ibid. 41. 10 E. 2. Common 22. 6 E. 3. 52. 11 E. 3. Quare imp. 158. 39 E. 3. 24.

44 E. 3. 21.
35 H. 6. 64.

Lib. 6. fol. 5.
Boswells case.
17 E. 3. 64. b.

50 E. 3. 14. b.

conveniences follow, when the right institution of the common law is not observed.

By this words *presenta-verit*, it appeareth that no plenarty doth put the patron that hath title to present, out of possession, but onely plenarty by presentation; but plenarty by collation doth put him that had right to collate out of possession.

(4) *Pari jure et ratione jus presentandi non habens.*] If tenant for yeers, or gardein in chivalry bring a *quare impedit*, although the defendant hath a writ to the bishop against the termor or gardein, and his clerk is admitted, instituted and inducted, notwithstanding the tenant of the free-hold of the advowson is not put out of possession. Note a diversitie between a meer usurpation, and him that comes in by course of law.

(5) *Ad ecclesiam.*] This is intended of a church presentative.

(6) *Cujus presentatus sit admiffus.* Albeit that *admiffus* in his proper sense is, when the bishop upon examination findeth him able (that is) *idonea persona*, yet here it is taken for institution; for here is implied *ad eandem ecclesiam*, and therefore of necessity it must be here taken for institution, and the rather, for that before institution the rightfull patron is not put out of possession. And it is to be observed, that by the institution the church, as to all common persons, is *plena et consulta* as to the spirituality, that is to say, the cure of souls: for when the bishop doth institute him, he saith, *instituo te ad tale beneficium, et habere curam animarum, et accipe curam tuam et meam*; but before induction the parson hath not the temporalities belonging to his rectory.

But the church is not full against the king before induction, because in the kings case plenarty is to be intended of a full and compleat plenarty, aswell to the temporalities as to the spirituality. *Nota*, present admissions and institutions, &c. are the life of advowsons; and therefore if patrons suspect that the register of the bishop will be negligent in keeping of them, he may have a *certiorari* to the bishop, to certifie them into the chancery.

And if there be an usurpation upon the king by a compleat plenarty, the king cannot present to the church, before he hath removed the incumbent by *quare impedit*, lest contentions might grow in the church between the severall claimers of the benefice, to the disturbance or hindrance of divine service, and this was by the common law.

But in that case the king is onely put out of possession, as to the bringing of an action, but the inheritance of the advowson is not develt out of him: see in the fourth part of the Institutes, cap. Ireland; when an * incumbent is made a bishop, either in England or Ireland, &c. who shall present.

(7) *Quam per breve de resto.*] This is to be understood where the patron that had a fee simple, and that he or some of his ancestors had presented: but if the patron claimed the fee-simple of the advowson by purchase, and had never presented, there he could have no writ of right of advowson, but before this statute had lost the advowson. And likewise if tenant in tail, or tenant for life had suffered any usurpation, they had been remediless by the common law, because they could have no writ of right.

If a bishop, abbot or prior, &c. purchase an advowson, and suffer an usurpation before they present, they and their successors are barred for ever, unlesse by force of this act the usurpation be avoided in a *quare impedit*.

Therefore

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33 H. 6. 13. Boswells case ubi sup.
Pl. Com. fo. 523.
Hb. 4. fo. 79.
Digby's case.
18 Eliz. Dier.
Giles case, lib. 9.
fol. 132.
Holt's case.
Regist. 286. b.
F.N.B. 246. m.
2 H. 4. 17. 8 H.
4. 20. 14 H. 6
21. 1 H. 7. 19.
10 H. 7. 15.
25 E. 3. cap. 3.
13 R. 2. cap. 1.
4 H. 4. ca. 21.
F.N.B. 36. k.
143. & 34. k.
21 E. 4. 34.
43 E. 3. 3. b.
22 H. 6. 27.
38 E. 2. 8. 9.
* Pasch. 24 E. 3.
Coram Rege
Cornub. Tr.
32 E. 1. Coram
Rege Rot. 75.
17 E. 3. 40. 21
E. 3. 40. 41 E. 3.
5. 46 E. 3. 32.
6 Eliz. Dier 228.
45 E. 3. Quare
Imp. 139.
43 E. 3. 15.
43 Aff. 21.
5 E. 3. 60.
F.N.B. 34.
35 H. 6. 54. 60.
5 E. 3. 60.
19 H. 6. 40.

Therefore in perusing over the severall branches of this statute, it shall appear what cases be remedied by this act, and what remain at the common law.

Per quod hæredes infra ætatem existentes per fraudem et negligentiam custodum, hæredes etiam sive majores sive minores per negligentiam, vel fraudem tenentium per legem Angliæ, vel mulierum tenentium in dotem, vel alio modo ad terminum vitæ, vel annorum, vel per feodum talliatum multotiens exhæredationem patiebantur de advocationibus illis, vel ad minus (quod eis melius fuit) ponebantur ad breve de recto, et in casu omnino exhæredati fuerunt hucusq; &c.

Here is the preamble containing the mischief, let us therefore peruse the words of the act.

(8) *Statutum est quod hujusmodi præsentationes.*] The preamble extendeth onely to heirs in ward, *per fraudem et negligentiam custodum, &c.* and the words of the body of the act are, *quod hujusmodi præsentationes*, such presentations; but these words are to be expounded, such presentations that be in the same mischief: and therefore this act extends to heirs of advowsons, though they be out of ward.

44 E. 3. 21. lib.
11. fol. 33.
Powlters case.
For this word
Hujusmodi, see
ca. 4. & circum-
specte agatis.

(9) *Rectis hæredibus.*] This act relieveth onely infants that have advowsons by descent; for if an infant have an advowson by purchase, he remaineth at the common law, and is not remedied by this act.

35 H. 6. 64.

And this being a law that suppresseth wrong, and advanceth right, doth binde the king, though he be not named in the act.

(10) *Aut illis ad quos post mortem aliquorum hujusmodi advocationes reverti debent.*] *Nota [illis] hoc est illis hæredibus*, to those heirs that have the reversion of the advowson by descent; for the preamble saith, *hæredes etiam sive majores, sive minores, &c.* And the perclose of this branch is, *qualem haberet ultimus antecessor hujusmodi hæredis, &c.* So as this statute doth help the heir of him in the reversion, and not the lessor himself, but the heir of him in the remainder is not within the purview of this act.

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35 H. 6. ubi sup.
Lib. 21. fo. 72.
Magd. Colledge
case.

P. com. 58.
F. N. B. 31. g.
Bro. tit. Present-
ment a leglise 46.

(11) *Post mortem aliquorum hujusmodi.*] That is, of tenant by the courtesie, tenant in dower, or otherwise for life, or for yeers, or in fee tail.

(12) *Pro termino annorum.*] Tenant for term of half a yeer, or a yeer, and grantee of the next avoidance are within the purview and meaning of this act; tenant by statute merchant, or staple, or *elegit*, are within the purview of this statute.

34 H. 6. 30.

(13) *Vel feodum talliatum.*] Tenant in tail of a mannor, whereunto an advowson was appendant, and before this statute an estranger usurped, and then the statute of *donis condit'* and this act is made, tenant in tail dyeth, and the mannor descendeth to his issue; yet the heir in tail hath no remedy, because the advowson was severed by the usurpation: and this act extendeth not to usurpations before this act.

8 E. 2. Quare
impedit. 167.
16 E. 3. ibid. 67.

But if tenant in tail suffer an usurpation after this act, and dyeth, his issue shall have remedy by *quare impedit* within the purview of this statute.

8 E. 2. ubi supra.
46 A. 4.

(14) *In*

16 E. 3. Quare
imp. 67. F.N.B.
31. b. Boswels
case, ubi supra.

(14) *In proxima vacatione post quam hæres ad ætatem pervenerit.*] Note, albeit the heir hath the advowson by descent, yet if he suffereth an usurpation, he hath no remedy by this branch, untill after he cometh of full age; this is to be intended when the heir is in ward, for so this act putteth the case: but if the heir be out of ward, he may have his *quare impedit*, or his assise of *darrein presentment* during his minority.

(15) *Per breve de advocacione possessorium.*] This is by *quare impedit*, or assise of *darrein presentment*.

(16) *Qualem haberet ultimus antecessor, &c.*] Then put case, that one purchaseth an advowson in fee, and dieth before any presentation made by him, and this descends to his heir within age, the church becomes void; if the heir be in ward, the heir may have his *quare impedit* at his full age, and if he be within age, and out of ward, he may have his *quare impedit*, and count of a presentation made by him of whom the purchase was made: but he can have no writ of right of advowson, because his ancestor, or he never presented.

Note it is not said here, *qualem habuit*, but *qualem haberet*, as the ancestor should have had if the church had become void in his time, and his title to present had accrued unto him, for there the right, or at least the possibility of action doth descend.

2 E. 3. 10, 11.

One seised of an advowson in fee, presenteth to the church being void, and granteth the same to A. for life, and after granteth the reversion to K. and his heirs; A. tenant for life suffereth an usurpation to the church, the heir of K. having the right of this advowson by descent, shall, after the death of A. the church becoming void, present, and yet K. could not have had a *quare impedit*: but if A. had dyed before the usurpation, then might K. have had a *quare impedit*, and therefore his heir shall have at the next avoidance that remedy which by possibility he might have had; and herewith agreeth the authority of the book in 2 E. 3. for there Tond taketh this exception, but durst not demur.

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(17) *Vel antequam dimissio facta fuerit ad terminum vel ad feudum talliatum*] Hereof sufficient hath been said before.

(18) *Hoc idem observetur de presentationibus factis ad ecclesias de hereditate uxorum.*] If a feme covert hath an advowson by purchase, she is not within the remedy of this act, and that for two reasons:

1 E. 2. Quare
imp. 43. 5 E. 3.
30. 43 E. 3. 15.
Thorpe. F.N.B.
34. s. Bro. tit.
Presentment al
eglise 46.

First, here it is said, *hoc idem observetur*; but an infant having an advowson by purchase is not holpen by this act, *et hoc idem observetur* in case of a feme covert.

Secondly, *de hereditate uxorum*, is here intended of an advowson by descent; for this word *hereditas*, see the first part of the Institutes, sect. 9.

See the first part
of the Institutes,
sect. 443. F.N.B.
34. m. Br. Pre-
sentment al
eglise 46.
See Maribr. ca.
28.

(19) *Viris etiam religiosi, &c.*] By this presentation and usurpation in time of vacation, albeit the free-hold and inheritance is in *abeance in gremio legis*, yet the usurper gaineth a fee-simple in the advowson: like as if one entereth into lands during the vacation, and claim the same as his inheritance, he gaineth an inheritance by wrong; but yet as the dying seised of lands in that case during the vacation shall not take away the entry of the successor, no more shall the usurpation during the vacation take away his right of presentation, when the church becomes void, and if he be disturbed, he shall have his *quare impedit*.

(20) *Nec tamen ita large intelligatur, &c. si se defenderint.*] So great regard the law hath to judgements, as this act provideth, that by any generall words of this act they shall not be avoided by pretence of feint defence: *quia judicia in curia regis reddita pro veritate accipiuntur, et judicia sunt tanquam juris dicta.*

(21) *Quia judicia in curia regis reddita.*] Here is one of the maxims of the common law.

"Judicia in curia regis reddita non adhibentur, sed sent in suo robore, quousque per errorem, aut attentatam adnullentur.

"Nihil tam conveniens est naturali æquitati, unumquodq; dissolvi eo ligamine, quo ligatum est.

"Interest reipub. res judicatas non rescindi.

(22) *Et de cætero una forma placit' in brevib' ultimæ præsent' et quare impedit inter justic' observetur, quoad hoc, quod si pars rea excipiat de plenitudine ecclesiæ per suam propriam præsentationē, non propter illam plenitudinē, remaneat loquela, dummodo breve infra tempus semestris impetretur.* By the common law (as hath been said) plenarty before the writ of *quare impedit* brought was a good plea, but plenarty hanging the writ was no barre at the common law; but now by this statute, plenarty is no plea in a *quare impedit*, or *darrein presentment*, unlesse it be by the space of six moneths before the *quare impedit* brought; for if the rightfull patron bring his action within the six moneths, it is maintainable by this statute, which short purview doth remedy many mischiefs at the common law.

Brit. fo. 234.

But this act doth not bind the king, for plenarty by the space of six moneths is no barre against him, but he may have his *quare impedit* when he will, for *nullum tempus occurrit regi*.

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But some have taken a diversity, when the king claimeth the advowson in his owne right *in jure coronæ*, and when he claimeth it in the right of a subject; for then he shall not be in better case then the subject was: as where the king was intituled to present in the right of a ward, and one did usurp, and the church was full by the space of six moneths, and it was adjudged within twelve yeares after the making of this act, that the king by this plenarty was barred of his *quare impedit*. But since that time the law hath been otherwise taken.

Mich. 25 E. 1.
rot. 148. in banco.
co. 3 H. 6. tit.
coron. simil.
18 E. 3. 2.

8 E. 3. 38. 43 E.
3. 13. 25 E. 3.
54. 4 E. 3. 1.
18 E. 3. 2.
24 E. 3. 76.

Plenarty by six moneths against the queen is a good plea, albeit she claime the advowson by the kings indowment.

And yet in all cases plenarty by six moneths is no plea in a *quare impedit*. If an advowson be aliened in mortmain, and the church become void, and a stranger usurp, and his clerke is in by six moneths, yet the immediate lord shall have a *quare impedit* within the yeare, for the statute of 7 E. 1. *de religiosis*, giveth him a yeare, and the immediate lord halfe a yeare after, &c. and for that cause also no descent of lands in the meane time shall take away his entry.

(23) *Infra tempus semestris.*] *i. infra sex menses.* And because this computation doth concerne the church, it is great reason that it shall be made according to the computation of the church, which church-men do best know; and therefore the computation shall be made according to the kalender for one halfe year, and not accounting 28 daies to the moneth, and so was it resolved in the court of common pleas, *temps E. 2.* and *temps H. 8.* as in the said case it appeareth.

Lib. 6. f. 67, 62.
Catesbies case.

Ante

Bract. li. 4. fo.
247. nu. 5.
Flet. lib. 5. c. 14.
Extr. suppl.
prælat. negl. 3.
& 4. de conc.
præb. ca. 5. &
Cap. unico. § 1.
de jure patrona-
tus. Mich. 3. E.
1. in banco 105.
Stafford. prior
de Lauda.

Mich. 5. E. 1. rot.
100. in banco
Lincoln. Nota.
* Rot. pat. 27 E.
3. pars 1. m. 18.
The counsell
bound not the
prerogative of
the king.

* Concilium
Lateran.

Regist. 42. b.
Nota per lapsum,
&c. est secundum
legem & consue-
tudinem Ang-
liæ. Pasch. 9 E.
1. in banco rot.
58. South' the
Bishop of Can-
terburies case per
tempus semestre.
19 E. 2. brev.
842. Regist. fo.
98. nota.

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22 E. 3. g. 30 E.
3. quare imp. 49.
43 E. 3. 35.
F.N.B. 36. c.

Ante concilium Lateranense nullum currebat tempus contra præsentantes, but the bishop was to provide one to serve the cure in the meane time, and the patron might present when he would. Britton fo. 225. a. calleth it the counsell of Lyons in France, for the counsell of Lateran in Rome. This counsell of Lateran was holden under pope Alexander the third, anno domini 1179. 25 H. 2. But our lapse is not according to the times and persons expressed in the canons; for they do give foure moneths to a lay patron, and six moneths to an ecclesiasticall, &c. neither hath therein the king any supreme title by them to conferre by lapse. And by the counsell, *tempus semestre* is to be accounted *per dies, et non per menses anni*: and therefore we hold, that the time and title to present by lapse, is *per legem Angliæ*, occasioned and established it may be by reason of the said generall counsell. See lib. 6. fol. 62. in Catesbyes case.

* In the reigne of Ed. 3. the clergy pretended that lapse should incurre against the king, whereupon it was thus resolved and published, *Rex ad agnitionem veritatis, et ad tollendum dubitationis scrupulum, quam quidem prærogativarum et jurium coronæ suæ, nescii hæredicuntur, omn' patr' voluit notitiæ, quod ab exordio nascente ecclesia in Anglia. Reges Angliæ ad omnia ecclesiastica beneficia qualitercunque vacantia, ad eorum collationem, &c. spectantia, quandocumq; placeret eis, jure suo regio præsentarunt, &c. sui que præsentati, &c. admissi fuerunt, &c. non obstantibus aliquibus curriculum temporum, seu * constitutionibus de præsentationibus hujusmodi infra certu tempus facti in contrarium editi &c.*

But see the Register, *rex venerabili in Christo patri R. episcopo London, &c. Quia secundum legem et consuetudinem regni nostri Angliæ, episcopi, seu alii diocesani ecclesias, seu alia beneficia de quorumcunque patronatu existunt, infra diocesariam suam vacantia per lapsum temporis ante sex menses à tempore vacationis earundem transactas conferre non debent, &c.*

And albeit if the lapse were established by authority of some act of parliament now (as many others be in like cases) not extant, yet the writ may serve *secundum legem et consuetudinem Angliæ*, as our bookes doe warrant.

It was well and graciously done of king James, in his generall pardon at his parliament holden in anno 21. of his reigne, he pardoned all titles and actions of *quare impedit*, as his majesty had or might, by reason of laps incurre above three yeares then past. A necessary branch to be contained in every generall pardon. For we have known an incumbent turned out of his benefice after 40 yeares quiet possession, by pretence of a laps upon the statute of 21 H. 8. ca. 13. yet after so long possession *omnia præsumi debent solenniter esse acta*.

(24) *Et cum aliquando inter plures clamantes ad vocationem alicujus ecclesiæ pax fuerit formata inter partes quod unus primo præsentet, &c.* This clause extendeth as well to strangers of blood, as to coparceners that are privie in blood, and if one of the parties or his heires, or any stranger usurp in the turne of another, the party wronged is not driven to his *quare impedit*; for so it may be, that the *quare impedit*, or assise of *darren presentment* may faile, and yet he may have remedy by this branch of the act, for albeit there be a plenarty by six moneths, yet the party may have a *scire facias* upon the roll or fine, and therein recover the presentation and damages.

(25) *Et*

(25) *Et cum contingat, &c. utrum perquirere velit breve de quare impedit, vel ultimæ præsentationis.*] Upon this branch two conclusions are to be observed.

1. First, that the heire in reversion is provided for in this case, and not the lessor himselfe, for here it is said, *verus hæres*.

2. That albeit tenant by the curtesie, tenant in dower, tenant for life or tenant in taile presented last, yet the heire, to whom the reversion falleth in possession, shall have by this branch an assise of *darren* presentment, albeit the heire or his ancestor did not immediately present before.

F.N.B. 31. g. i.
Glanv. l. 13. ca.
19. Bract. lib. 4.
240, 241. &c.
Brit. ca. 62. fol.
224.
Flet. lib. 5 c. 11.
20 E. 3. Darr.
present. 13.

Et de cætero in brevibus ultimæ præsentationis, et quare impedit, adjudicentur damna, viz. si tempus semestre transierit per impedimentū alicujus, ita quod episcopus ecclesiam conferat, et verus patronus ea vice præsentationem suam amittat, adjudicentur damna, ad valorem ecclesiæ de duobus annis.

(26) *Adjudicentur damna.*] Before the making of this act, the plaintife in a *quare impedit* recovered no damages, lest any profit the patron should take should favour of simony, which the common law did so detest: and this is the cause that the king in a *quare impedit* recovereth no damages, because he could recover none by the common law, and the king is not within the purview of this act, for the causes shewed in *Boswells* case.

And forasmuch as no damages were in a *quare impedit* at the common law, and this act after the statute of Gloucester giveth damages only, the plaintife shall recover no costs.

In a *quare impedit* against a prior patron, and incumbent, the prior plead in barre, and the incumbent plead the same plea, whereupon issues are joyned, the prior dyeth, the issue is found for the incumbent, he shall not recover damages by this act, for he cannot have a writ to the bishop, and he continued in possession.

(27) *Si tempus semestre.*] If upon the foundation of a chauntry the composition be, that if the patron present not within a moneth, the ordinary shall collate in a *quare impedit* brought for this chauntry, if the moneth be past, the plaintife shall recover damages for two yeares within the equity of this statute, for that the patron in this case loseth the presentation, although the words of the statute be *per tempus semestre*, and this is *per tempus mensis tantum*.

(28) *Ita quous episcopus ecclesiam conferat, &c.*] Here *conferat* is to be taken for *legitimè conferat*.

Albeit the bishop hath not collated, yet if he hath *jus conferendi*, the plaintife shall, if he will, recover double damages within the meaning of this act.

But albeit the six moneths be past, so as the bishop hath a just title to present by lapse, yet if the church doth remaine void, the plaintife at his perill may pray a writ to the bishop: but then he shall not recover double damages but for halfe a yeare only, because in that case he shall recover his presentation, so as it is in the plaintifes election in that case, either to lose his presentation, and have double damages, or to have his presentation, and single damages.

The plaintife in a *quare impedit* after appearance was non-suit, whereupon the court awarded a writ to the bishop for the defendant, and a writ to the sherife to enquire when the church became

II. INST.

E e

void,

Lib. 5. f. 58, 59.
Specot's case.
Lib. 6. f. 49. 51.
Boswells case.
14 E. 3. quare
impedit. 54.
Temps E. r. libid.
181. 3 H. 6. da-
mag 17. 34 H. 6.
51. 18 E. 1. co-
ram rege & con-
cilio ad parlia-
ment. fol. 2.
inter dominum
regem & epis-
copum Winton.
pro custod.
hospit. South.
27 H. 6. 10.
9 H. 6. 30. 32.
13 E. 4. 3.

[363]

11 H. 4. 80. lib.
9. fo. 26. Strat.
mercella.
43 E. 3. 11.

8 E. 35. quare
impedit. 24. 39 E.
3. 15. 46 E. 3.
15. 13 E. 3. en-
quæst 43. 11 H.
4. 40. 13 E. 4. 3.
Dyer 3. El. 15.
7 El. 241.

27 E. 3. damages
106.

void, the yearly value thereof, and whether the church were full, &c. the sheriffe returned the time of the voidance, the yearly value, and that the bishop had collated by lapse, whereby it appeared *tempus semestre* was past before the writ could be served, yet seeing the judgement was given within the six moneths, he could recover the damages but for halfe a yeare.

And it is to be observed, that albeit the bishop doth collate, yet if his incumbent be removed by judgement within the six moneths, or after, the plaintife shall recover the damages but for halfe a yeare, for the words of this branch are, *et verus patronus ea vice præsentationem suam amittat*, so as if he lose not his presentation, the collation of the bishop is not materiall.

24 E. 3. 35. 39 E.
3. 15. Regist. 50.
54. F.N.B. 52.
46 E. 3. 15 b.

(29) *Ad valorem ecclesiæ.*] This shall be accounted according to the very true value, as the same may be letten.

(30) *Et si impeditor*, &c.] No damages by this act are to be recovered but against him that is *impeditor*, a disturber.

In a *quare impedit* against the patron and incumbent, the plaintife recovers the advowson *post semestre tempus*, and because the incumbent was *impeditor*, for that he had counterpleaded the title of the plaintife, therefore he recovered the value for two yeares as well against the incumbent as the patron.

(31) *Et de cætero concedantur brevía de capellis, præbendis, vicariis, hospitalibus, abbatibus, prioratibus, et aliis domibus quæ sunt de advocacionibus aliorum, quæ prius concedi non consueverunt.*] *Ecclesia, capella.* When the question was, whether it were *ecclesia*, aut *capella pertinens ad matricem ecclesiam*, the issue was, whether it had *baptisterium et sepulturam*: for if it had the administration of sacraments and sepulture, it was in law judged a church, Trin. 20. E. 1. *in banco* Rot. 177. *in quare impedit*. Ric' de Smithes case. Mich. 21. E. 1. *in banco* Rot. 1. Hertf. Prior de Elies case. Hill. 8 E. 1. *in banco*, Roger de Bigod, & Counte de Norff. case, Hill. 8 E. 2. *coram rege* Cornub. *pro capella sancti Berone.* *A capella venit capellania* Rot. Cart. 26. Nov. an. 28 H. 3. *in cart' fact' Will. Oxon' episcopo et capellan' ut patet*, Mich. 32. E. 1. *coram rege* Gloc' *capellania Sancti Oswaldi, prioratus Sancti Oswaldi de Gloc' quæ est de libera capellania nostra.*

Trin. 23. H. 3.
rot. 15. *in turri*.
Bract. lib. 4. fol.
241. b. Brit. fol.
226. b. Flet. li. 5.
ca. 14. 14 H. 3.
quare impedit.
183. 34 E. 1.
ibid. 187. 47 E.
3. 4. 8 H. 6.
32. 24 E. 3.
ibid. 26. 45 E.
3. *ibid.* 128.
14 H. 4. 11.
Inter brevía 28
Maii, anno regis
E. 1. 11. 6 E. 3. 5.
39. Bract. li. 4. f.
240. 241.
Regist. 31. a.
19 H. 3. Dar.
presentment, pl.
ult. Vid. Rot.
claus.
18 H. 3. m. 3.
* [364]
47 E. 3. 4.
8 H. 6. 32.

It appeareth here, and by 6 E. 3. that before this act writs did not lye *de capellis, præbendis, &c.* and yet it is adjudged in 14 H. 3. which was long before this statute, that a *quare impedit* did lye of a chappell, and it was resolved in parliament, Hill. 19 H. 3. *Quod nulla assisa ultimæ præsentationis capiatur de * ecclesiis præbendatis, nec de præbendis*: but now this act hath made it cleare, and the writ shall be *ad capellam, &c.*

If a patron of a chappell present unto it by the name of a church and the clerke be instituted and inducted thereunto, &c. it hath lost the name of a chappell.

(32) *Brevia.*] That is, writs of right of advowson, *quare impedit*, and assise of *darren presentment*, which in this act had been named before.

Et cum per breve de indicavit impeditur rector alicujus ecclesie ad petendum decimas in vicina parochia, habeat patronus rectoris sic impediti breve ad petendam advocacionem decimarum petitarum. Et cum disfratignatum fuerit, procedat postmodum placitum

citum in curia christianitatis, quatenus distracionatum fuerit in curia regis.

[33] *Indicavit.*] Hereby, and by the Register, and F. N. B. it appeareth where the writ of *indicavit* doth lye, and it properly appertaineth to another treatise. Regist. 35, 36.

But this is an ancient writ by the common law of England, the forme whereof appeareth in Glanville, and other ancient authors.

[34] * *Ad petendum decimas.*] By the common law, if the incumbent of one patron demanded tithes against the incumbent of another patron, the writ of *indicavit* did lye, for that the right of the patronage should come in question, for by the presentation of the patron, his incumbent is to have the tithes, which are the profits of the church; and in a writ of right of advowson the patron shall alledge the esples in his incumbent in taking of the great and small tithes: and therefore if the right of tithes came in question, that concerned the right of advowson, the writ of *indicavit* did lye, and this appeareth by the writ it selfe.

But for subtraction of tithes against an inhabitant within the parish of the rector claiming from one patron, where the right of the advowson of the tithes never come in question, the court christian hath jurisdiction.

The mischief before this statute was, that seeing the right of tithes could not be tried between the two persons after the *indicavit* granted, the person prohibited was without remedie for tryall of the right of tithes; and therefore this act doth give the patron, whose clerke is prohibited, a writ of right *de advocacione decimarum*, the forme of which writ appeareth in the Register, and if the right be tryed for the demandant, the cause shall be remaunded into the court christian.

But what if the patron hath but an estate in taile, or an estate for life, &c. so as he cannot have this writ of right of advowson, what remedie shall be had for tryall of the right of tithes in this case? It seemeth that by construction of this statute, the defendant in the *indicavit* appearing upon the attachment shall plead to the right of the tithes in the kings court, or otherwise he shall be without remedie. And this standeth well with the words of the writ of *indicavit*, viz. *Vobis prohibemus, ne placitum illud teneatis, donec discussum fuerit in curia nostra, ad quem illorum pertineat ejusdem ecclesie advocatio, &c.*

By this branch it appeareth, that the value of the tithes at the making of this act was not materiall; for of whatsoever value they were of, the right of tithes could not be determined in court christian; but by the statute of *artic' cleri*, cap. 2. the tithes must amount to a fourth part of the value of the church in that case, or otherwise the writ of *indicavit* doth not lye, but the king may have a writ of a lesser part, for he is not bound by that act.

Also by this act a writ of *indicavit* was maintainable *ante litem contestatam*, that * is, when the party hath libelled in court christian, and the adverse party hath answered thereunto, but this is remedied by the statute of *conjunctim seoffatis*.

A writ of *indicavit* must be brought by the patron before sentence given in court christian, as it appeareth by the words of the writ;

E c 2

for

Glanville, lib. 4. ca. 13. Bract. li. 5. fol. 402. b. Britt. fo. 260.

31 H. 6. 14. b. Mich. 2 E. 1. in banco rot. 52. Leic' indicavit de 4. part. * 4 E. 3. 27. 7 E. 3. 42. 31 H. 6. 14. 38 H. 6. 20, 21. 12 E. 4. 13. 2 H. 7. 12.

Bract. li. 5. 402. Brit. fol. 33. 28 E. 3. 97.

4 E. 3. 27. 31 H. 6. 14. 38 H. 6. 20, 21.

See Art. cleri ca. 2. 9 E. 2. Bract. li. 5. 402, 403. 38 H. 6. 20.

Regist. 29. F. N. B. 45. b. * [365] An. 34. E. 1. 31 H. 6. 13, 14. F. N. B. 45. b. 12 E. 4. 13.

for it is but a *superfeded' donec*, &c. *ne placitum illud teneatis, donec discussum fuerit*, &c. and this act saith, *procedat postmodum placitum in curia christianitatis*, which could not be after sentence.

38 E. 3. 13. a.

4 E. 3. 28.

F.N.B. 45. Doct.

8. Stud. ca. 25.

fol. 108.

Rot. Parliament.

20 E. 3. nu. 203.

F.N.B. 45. d.

And albeit this statute doth give the writ of right of advowson of tithes, yet a writ may be brought *de decimis et oblationibus*; for oblations be *in consimili casu*.

This writ of *indicavit* is against the canonically sanction, and yet hath been ever obeyed; for all forraigne sanctions or canons against the law or custome of the realme are of no force, and binde not here, as elsewhere hath been spoke more at large.

The writ of *indicavit* shall not mention that the tithes, &c. in suit amount to a fourth part of the church, but it shall be pleaded by the other party to have a consultation.

If an abbot be parson in-parsonage of the church of D. and another abbot is parson in-parsonage of the church of E. so as there be (in effect of the appropriations) but two parsons, yet for that each party is both patron and incumbent, an *indicavit* lyeth between them.

31 H. 6. 14.

38 H. 6. 26.

F.N.B. 45. c.

18 E. 2. quare

Imp. 176. 19 E.

2. ibid. 177. 19

E. 3. ibid. 59. 31

E. 3. ibid. 1. 20

E. 3. ibid. 63. 64.

7 E. 3. 20. 45 E.

3. 12. 11 H. 4.

54. 4 H. 5. 10.

21 H. 6. 47. 34

H. 6. 40. 35 H.

6. 59. 38 H. 6.

8, 9. 2 H. 7. 4.

5 H. 7. 3. li. 3.

10. 22. Walkers

case. F.N.B. 36.

d. 15 E. 3. Darr.

present. 11.

22 E. 4. 94.

33 E. 3. quare

imped. 146. 30

E. 3. Statham

quare imped.

21 E. 3. 32. 13

E. 3. quare im-

ped. 58. 6 E. 3.

39. 52. 7 E. 3.

20, 21. 15 E. 3.

Darr. present.

11. 20 E. 3.

monit' de laits

72. 13 E. 3.

quare imped. 58.

17 E. 3. 30. 37.

21 E. 3. 37.

11 H. 4. 54. 27

H. 3. 11. 36 H.

8. cit. present.

Bro. Brast.

lib. 4. fol. 238.

245. Brit. fol.

224.

[35] *Cum advocatio descendat participibus, licet unus bis presentet, et usurpet super cohæredem, non propter hoc exclusus sit ille in toto qui fuit negligens, sed alias habeat turnum suum presentandi, cum acciderit.*]

By the common law, if an advowson descended to divers coparceners, if they cannot agree to present, the eldest sister shall have the first turne, and the second the second turne, *et sic de cæteris*, every one in turne according to seniority: and this priviledge extends not onely to their heires, but to the severall assignees of every coparcener, whether he hath the estate of them by conveyance, or by act in law, as tenant by the curtesie, hee shall have the same priviledge by presenting in turne as the sisters had: therefore albeit the coparceners do make composition to present by turne, this being no more then the law doth appoint, *expressio eorum quæ tacite insunt nihil operatur*: therefore they remaine coparceners of the advowson, and the inheritance of the advowson is not divided, and notwithstanding this composition they may joyne in a *quare impedit*, if any estranger usurp in the turne of any of them: and the sole presentation out of her turne did not put her sister out of possession in respect of the privy of estate, no more then if one coparcener taketh the whole profits. If one joyntenant present alone, this doth not put the other out of possession, in respect of the unity of the title, but the ordinary might have refused his presentee, as he might the presentee of one tenant in common, in respect of some varying opinions in old bookes: therefore this act doth declare the law, as here it appeareth.

This law doth extend to usurpations by one coparcener upon another, as well before partition, as after.

CAP. VI.

CUM quis petat tenementum versus alium, et implacitatus vocaverit ad warrantum, et warrantus dedicat warrantiam, et diu pendeat placitum inter tenentem et warrantum, cum ad ultimum convincatur, quod vocatus ad warrantum warrantizare tenetur per legem et cons. hactenus usitatam, non fuit antea alia pœna inflicta vocato, qui warrantiam dedixit, nisi tamen quod warrantizaret, et esset in misericordia, quia prius non warrantizavit, quod durum fuit petenti, quia multoties per collusionem inter tenentem et warrantum magnas sustinuit dilationes. Propter quod dominus rex statuit, quod sicut tenens amitteret tenementum petitum, si vocasset ad warrantum, et warrantus se posset devolvere de warrantia: eodem modo amittat warrantus si warrantiam dedicat (1), et convincatur quod warrantizare debeat. Et si inquisitio pendeat inter tenentem et warrantum, et petens petat per breve ad faciendum venire juratum, concedatur ei, &c. (2).

WHEN any demandeth land against another, and the party that is impleaded voucheth to warranty, and the warrantor denieth his warranty, and the plea hangeth long between the tenant and the warrantor; and at length, when it is tried, that the vouchee is bound to warranty: by the law and custom of the realm hitherto used there was none other punishment assigned for the vouchee that denieth his warranty, but only that he should warrantize, and should be amerced, because he did not warrant before, which was prejudicial unto the demandant, because he suffered oftentimes great delays by collusion between the tenant and the warrantor. Wherefore our lord the king hath ordained, that like as the tenant should leese the land being in demand, in case where he vouched, and the vouchee could discharge himself of the warranty, in the same wise shall the warrantor leese in case where he denieth his warranty, and it be tried against him that he is bounden to warranty. And if an inquest be depending between the tenant and the warrantor, and the demandant will require a writ to cause the jury to come, it shall be granted him.

(45 Ed. 3. 16. Rast. 352. 637, &c.)

Albeit the Mirror saith of this act, *L'estatute de garranties nest forsque revocation de error usee jesque a droit ley*, yet the tenant, according as it is here recited in the preamble of this act, after the warranty tryed, could have no other judgement, but that the vouchee should warrant the land, according to the voucher of the tenant, but this was many times in great delay of the demandant by collusion or agreement between the tenant and the vouchee, for remedy whereof this statute was made.

Propter quod dominus rex statuit quod sicut tenens amitteret tenementum petitum, si vocasset ad warrantum, et warrantus se posset devolvere de warrantia, eodem modo amittat warrantus,

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fi

si warrantiam dedicat, et convincatur quod warrantizare debeat.

Lib. 6. cap. 23.

Which Fleta rendreth in these words:

Si is qui ad warrantiam tenetur warrantizare falso contradixerit, provisum est, quod sicut tenens amitteret tenementum, si vocasset ad warrantum, et warrantus se posset devolvere de warrantia, eodem modo amittat warrantus warrantizare dedicens, si convincatur quod warrantizare debeat.

Mich. 16 E. 1. in
banco rot. 44.
Rog. de Mow-
brays case. 5 E. 3.
Voucher 249.
Paris case. 30 E.
3. 6. Simeon's
case. Liber plac'
Rast' 352. 614.
6 H. 4. 3, 4.

(1) *Si warrantiam dedicat.*] This is not to be understood onely where the vouchee denieth the deed, or other cause of the warrantie, and thereupon issue is taken, and found against the vouchee: and where the vouchee entereth into the warranty, and demands of the tenant what he hath to bind him to warranty, and the tenant sheweth speciall matter to bind him to warranty, and the vouchee demurreth in law upon the lien; this is within the remedy of this act; for the words subsequent be, *si convincatur quod warrantizare debeat*, which the vouchee is in this case; and this act being made to oust delays, which are odious in law, is to be interpreted favourably.

[367]

And it is to be observed, that here is *sicut*, which is an adverb of similitude, *viz.* *Sicut tenens amitteret, si vocasset ad warrantum, et warrantus se posset devolvere de warrantia.* Under which words are included, if the vouchee can devolve him of the warranty by demurrer, or any issue whatsoever, *eodem modo* (saith this act) *amittat warrantus, &c.* which fortifieth the former exposition that hath been made; and to be short, wheresoever the judgement at the common law should have been against the vouchee upon false plea, or demurrer, &c. *quod warrantizaret*, all these cases are within the provision of this act.

(2) *Et si inquisitio pendeat inter tenentem et warrantum, et petens petat breve ad fac' venire juratum, concedatur ei.*] Here is further remedy given for the demandants expedition, that he may sue out the *venire fac'* for the tryall of any issue between the tenant and vouchee.

These things are necessary to be knowne; for at this day vouchers are most commonly used for delay.

C A P. VII.

CUSTODI (1) *de cætero concedatur breve de admensuratione dotis. Nec per sectam custodis, si fidei ei per collusionem sequatur* (2) *versus mulierem tenentem in dotem, præcludatur hæres cum ad ætatem pervenerit ad dotem admensurandam, secundum quod per legem Angliæ fuit admensuranda. Et tam in isto brevi, quam in brevi de admensuratione pasturæ, celeriter quam prius de cætero sit processus* (3), *ita quod*

A Writ of admeasurement of dower shall be from henceforth granted to a guardian; neither shall the heir, when he cometh to full age, be barred by the suit of such a guardian, that sueth against the tenant in dower feignedly, and by collusion, but that he may admeasure the dower after, as it ought to be admeasured by the law of England. And as well in this writ, as in a writ of admeasurement of pasture,

quod cum perventum fuerit ad magnam distractionem, dentur dies, infra quos duo comit. teneantur (4), ad quos publica fiat proclamatio, quod defendens veniat ad diem in brevi contentum querenti responsurus. Ad quem diem si venerit, procedat placitum inter eos, et si non venerit, et proclamatio supradicta modo per vicecomitem testificata fuerit, procedatur per defaultam ad admeasurementem faciendam.

ture, more speedy process shall be awarded than hath been used hitherto; so that when it is come unto the great distrefs, days shall be given, within which two counties may be holden, at the which open proclamation shall be made, that the defendant shall come in at the day contained in the writ, to answer to the plaintiff; at which day, if he come in, the plea shall pass between them; and if he do not come, and the proclamation be testified by the sheriff in manner abovesaid, upon his default they shall make admeasurement.

Vide Mich. 10 E. 1. in banco rot. 105. Northt. Pasc. 18 E. 1. in banco rot. 15. Laurence de Oyfileurs case. (Fitz. Admeasur. 3, 4, 5, 9, 10. 13. 17. 7 Ed. 4. 22. 18 Ed. 3. 30. Regist. 171. 297.)

Before this act, if the heire within age, before the garden in chivalry enter into the land, had assigned dower to the wife more then he ought to have, the garden had been without remedy: for no writ of admeasurement of dower being a reall action lay for the garden at the common law implied by *de cætero*.

Brit. cap. 113. fol. 263.

(1) *Custodi.*] Garden *in droit* or *in fait* shall have this writ by this act, if the assignement of dower be made in his owne time; but if the assignement be made by the heire in time of garden *in droit*, and after the garden *in droit* assigneth his interest over, the assignee shall not have a writ of admeasurement, for that the garden *in droit* had but a chose in action; but if the assignement had been made in the time of the garden *in fait*, he should have had a writ of admeasurement of dower by this act.

7 R. 2. tit. admeasurement 4. F.N.B. 149. a.

But this is to be understood (though the statute be generall) when the heire within age assigneth dower, as is aforesaid, or when dower is assigned in the right of the heire, or the garden assigneth more dower then he ought, the heire after his full age shall have a writ of admeasurement of dower by the common law, and he cannot have it before, because the interest of the garden (which he may give away) endureth untill that time; but if the heire within age be out of ward, and assigneth more dower then he ought within age, he may have an admeasurement of dower within age, for enter he cannot.

If the garden assigneth more dower than he ought, and the heire dyeth, his heire shall have a writ of admeasurement of dower.

* And so if the heire within age assigne dower, and dyeth, his heire shall have the like writ; but if the ancestor of full age, being tenant in fee-simple, assigneth dower more then he ought, his heire shall never avoid it, because he had full power to assigne as much as he would.

The king is intituled by false office to the wardship of the body and lands of the heire of J. S. being within age, dower is assigned

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Glanv. li. 6. ca. 13. Brañ. li. 2. fo. 93. lib. 4. 314, 315. Flet. li. 5. c. 22. & 33. Brit. fo. 263. Mirror, c. 5. § 5. 7 E. 4. 22. b. 7 E. 2. admeasurement. 13. 7 R. 2. ibid. 4. 21 H 7. 43.
* Brit. c. 113. fo. 263. b. 6 H. 3. admeasurement. 8. 7 R. 2. tit. admeasurement. 4. le Cointee de Devons case.

10

17 E. 3. 71.
F.N.B. 149:

to the wife more then she ought, the garden in chivalry traverseth the office, and avoideth it, this garden shall by this act have a writ of admeasurement of dower of the assignment made by the king, having but a defeasible title to the wardship.

By the like reason, if tenant by knight-service dyeth, his heire within age an estranger abate, and endoweth the wife of more then she ought, the garden seifeth the ward, he shall by this act have a writ of admeasurement of dower: and so if J. S. seised of lands in fee taketh wife, and is disseised and dyeth, the disseisor assigneth more in dower than she ought, the heir entreteth into the residue, he shall have a writ of admeasurement by the common law, and this well agreeth with the words of the writ, viz. *Quod C. quæ fuit uxor prædicti B. plus habet in dotem de lib ro tenemento, quod fuit prædicti B quondam viri sui in N. quam habere debet, et ad ipsam pertinet habendam.*

14 H. 3. admea-
sur. 10. F.N.B.
149 c.

And albeit the words of the writ be in the present time, *plus habet in dotem*, &c. yet it is to be taken, that she had more in value at the time of the assignment of dower; for if by her industry and policie it be made of greater value afterward, no writ of admeasurement lyeth for this improvement.

(2) *Nec per sectam custodis si fide per collusionem sequatur, &c.*] Hereby is remedy given to the heire at his full age, if the garden prosecute feindly, or by collusion against the wife, so as the heire shall not be barred in his writ of admeasurement against the tenant in dower.

11 H. 4. 3.
Plow. com. 55.
9 H. 6. 5.

The heire shall not be driven to shew the manner of the feint pleading, but to alledge the same generally.

The tenant in a *precipe* doth plead, that an estranger hath recovered against him by verdict in an assise, the plaintife against this verdict cannot generally averre, that this was by covin, but must shew some speciall matter.

Regist. 171. Vet.
N. B. 9. & 10.
F. N. B. 148. h.

(3) *Et tam in isto brevi, quam in breve de admesuratione pasturae, celeriter quam prius de cætero fiat processus.*] Whereas by the common law the proesse in both these writs were summons, attachment, and distress infinite, by this act a more speedy proceeding is provided.

34 E. 3. damag.
2. 41 E. 3. 19.
Regist. 171.

There is great affinity between these two writs, as hereby it appeareth: amongst others there is one difference, that in a writ of admeasurement of dower the demandant shall recover damages, if the tenant appeare not the first day, and yeeld to admeasurement for the issues in the meane time: but in admeasurement of pasture no damages shall be recovered at all.

Mirror, c. 5. § 5.

More shall be said of the proesse, and proceeding in this writ of admeasurement of dower in the exposition of the next chapter, onely to remember by the way what the Mirror saith, *Le'statute de admesurement est reprovable in plusieurs points quant as proclamations, de sicone admesurement, et surcharge sont feaisibles per juries de office.*

(4) *Ita qd' cum perventum fuerit ad magnam districtionem, dentur dies, infra quos duo comitatus teneantur, &c.*] By reason of these words, *cum perventum fuerit ad magnam districtionem* the very writ of distress shall containe, *et interim in duobus plenius comitatibus tuis publice proclamari fac', quod prædicti A. quæ fuit uxor T. veniat coram præfatis justiciariis ad respondendum, &c. si voluerit, et ad audiendum judicium suum pro pluribus defatis.*

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And

And yet I find, that after the grand distresse returned, the plaintiffe prayed a proclamation, and there it is taken, that he had not surceased his time, but it was granted.

4 E. 3. admeasurement. 12.

See more of admeasurement of dower in the next chapter following.

C A P. VIII.

CUM per placitum motum per breve de admensuratione pasturæ, pastura fuerit admensurata aliquando coram justic' aliquando in com' coram vicecom', multotiens contingit, quod post hujusmodi admensurat' actam, iterum ponit illi, qui primo superoneravit pasturam, plura animalia quam ad ipsum pertinet habent', nec super hoc hucusque provisum fuisset (1) remedium: statutum est, quod de secunda superoneratione fiat remedium conquerenti sub hac forma, quod conquerens habeat breve de judic' is, si coram justic' admensurata fuerit pastura (2) quod vic' in presentia part. um præmonitarum (si interesse voluerint) inquireat de secunda superoneratione. Quæ si inventa fuerit, mandetur justic' sub sigillo vic', et sigillis juratorum, et justic' adjudicent conquerenti damna, et ponant in extractis valorem animalium quæ superonerat' post admensurationem factam posuit in pastura, ultra quod debuit, et extractas liberent baronibus de scaccario, ut inde respondeant domino regi. Si in com' facta fuerit admensuratio, tunc ad instantiam querentis exeat breve de cancellaria (3) quod vic' inquireat super hujusmodi superonerat', et de averiis positis in pasturam ultra debitum numerum, vel de pretio dom' regi ad scaccar' suum respondeat. Et ne vic' fraudem faciat domino regi (5) in isto casu, concordatum est, quod omnia hujusmodi brevicia de secunda superonerat' (4), quæ exeunt de cancell' irrotulentur, et in fine anni mittantur transcripta ad scaccar', sub sigillo cancellarii, ut videant thesaurarius

WHEREAS by a plea moved upon a writ of admeasurement of pasture, the pasture was sometime admeasured before the justices, sometime before the sheriff in the county, and it chanced many times, after such admeasurement made, the pasture to be overcharged again by him that first did it, with more beasts than he ought to keep, whereupon no remedy hath been yet provided; it is ordained, that upon the second overcharge, the plaintiff shall have remedy in this manner: if the admeasurement were before the justices, the plaintiff shall have a writ judicial, that the sheriff in presence of the parties being summoned (if they will come) shall inquire upon the second overcharge; which if it be found, it shall be returned before the justices, under the seals of the sheriff, and the seals of the jurors; and the justices shall award the plaintiff damages, and shall put in the extreats the value of the beasts which were put into the pasture after such admeasurement more than he ought, and shall deliver the extreats unto the barons of the exchequer, whereof they shall answer unto the king. If such admeasurement were made in the county, then, at the request of the plaintiff, a writ shall go out of the chancery, that the sheriff shall inquire of such overcharge; and for the beasts put in the pasture above the due number, or for the value of them, he shall answer to the king at the exchequer. And lest the sheriff might defraud the king in this case, it is agreed,

rius et barones de scaccar' qualiter vic' respondeat de exitibus hujusmodi brevium. Eodem modo irrotulentur brevia de redisseisina, et mittantur ad scaccarium in fine anni.

agreed, that all such writs *de secunda superoneratione*, that pass out of the chancery, shall be inrolled, and at the year's end the transcripts shall be sent into the exchequer under the chancellor's seal, that the treasurer and barons of the exchequer may see how the sheriff doth answer of the issues of such writs. In the same wise writs of redisseisin shall be inrolled and sent into the exchequer at the year's end.

Glanv. li. 12. c. 13. Bract, li. 4. fo. 229. Brit. fo. 138. Flet. lib. 4. cap. 23. Mirr. cap. 5. § 5. (Rast. 22. Regist. 157.)

7 E. 4. 22.
F.N.B. 225 h.
& 148. f. g.

44 E. 3. 10.

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Regist. judic. fo.
36. b. & 40. a.

Regist. judic.
ubi supra.

Anno 11 H. 3.
in archivis turris
London.

Regist. 157. Re-
gist. judic. 36.
F.N.B. 126.
Flet. li. 4. c. 23.
7 E. 4. 22. Vet.
N. B. fol. 72.

Registr. 157.

Temps E. 1. ad-
measurement
15. 18 E. 3. 30.
7 E. 4. 23.
8 H. 6. 26.
F.N.B. 126. i.

It is to be observed, that the writs of admeasurement of pasture and of dower are vicountell, and are not returnable, and the parties may thereupon plead before the sheriffe in the county.

But these pleas may be removed out of the county court by *pone* at the suit of the plaintife, without shewing cause in the writ, but at the suit of the defendant he ought to shew cause.

Now where this statute saith, *aliquando coram justiciariis*, that is, when the plea is removed before the justices, there upon pleading, or confession before them after admeasurement made and returned, judgement shall be given by the justices; but if the plea be not removed, the admeasurement shall be enquired of, and made before the sheriffe, and so be these words (*aliquando in comit' coram vicecom'*) to be understood.

See the judicial writ of admeasurement of pasture granted by the court of common pleas for making of admeasurement, which writ is returnable before the justices.

(1) *Nec super hoc hucusque provisum fuisset.*] Yet I have seen a record in 11 H. 3. where a writ *de secunda superoneratione* was granted.

(2) *Statutum est, quod de secunda superoneratione fiat remedium conquerenti sub hac forma, quod conquerens habeat breve de iudicio, si coram justiciariis admensurata fuerit pastura.*] The effect of which judicial writ is, that the sherife in the presence of the parties, if they will be present, being warned, shall enquire by a jury of the second furcharge, and what cattell secondly furcharged, and the value of them, which if it be found, and returned under the seale of the sherife, and the seales of the jurors, the justices shall adjudge damages to the party, and the cattell which furcharged after the admeasurement made shall be forfeited to the king, and the value of them shall be estreated into the exchequer, that thereof the king may be answered.

(3) *Si in com' fact' fuerit admensuratio, tunc ad instantiam querentis exeat breve de cancellaria.*] Which writ you may find in the Register.

(4) *De secunda superoneratione.*] And here it is to be knowne, that a writ *de secunda superoneratione* lyeth not against any that furchargeth after a former admeasurement, but onely against them, against whom the writ was brought, and which were particularly charged

charged with surcharge in the writ; for all the commoners, as well those which surcharged not, as those which surcharged, are to be admeasured; and therefore it appeareth not who surcharged, but onely they that are charged therewith, and so found: hereupon it followeth, that a writ *de secunda superoneratione* lyeth not against any but against them that were named, and thereof convicted in the first writ; for he cannot be charged with a second, that was not culpable of the first: and therefore none but such as were named in the former writ shall forfeit their cattell, &c. or yeeld damages.

(5) *Et ne vicecomes fraudem fac' domino regi.*] Here is provision made to prevent the fraud of sherifes, lest by their fraud they should prevent the king of his duty.

CAP. IX.

CUM capitales domini distringunt feodum suum pro consuetudinibus et servitiis (1) sibi debitīs, et medius sit (2) qui tenentem acquietare debeat (3), cum non jaceat in ore tenentis, postquam districtionem replegiaverit, dedicere demanda capitalis domini sui, qui advocat in curia regis justam districtionem fieri super tenentem suum, viz. super medium: multi per hujusmodi districtiones hucusque

[371] gravati extiterunt, per hoc quod medius (licet haberet per quod distringi posset) magnas fecit dilationes antequam ad curiam venerit ad respondendum hujusmodi tenentibus suis ad breve de medio: per hoc etiam quod durius fuit in casu quando medius nihil habuit, in casu etiam cum tenens paratus esset facere capitali domino servitia et consuetudines exactas, et capitalis dominus servitia, et consuet. sibi debitas renuebat percipere per manum alterius, quam per manum proximi tenentis sui (4), et sic amiserunt hujusmodi tenentes in dominico proficuum terrarum suarum aliquando ad tempus, aliquando toto tempore suo, nec fuit antea aliquod remedium in hoc casu provisum. Ordinatum est et provisum in hoc casu remedium in posterum, sub hac forma, quod quam cito hujusmodi tenens in dominico, habens medium inter ipsum et capitalem dominum, distringitur,

WHEN chief lords distrain in their fee for customs and services to them due, and there is a mean which ought to acquit the tenant, sithence it lieth not in the mouth of the tenant, after that he hath replevied the distress, to deny the demand of the chief lord, which avoweth in the king's court, that the distress is lawfully taken upon his tenant, which is upon the mean; and many have been heretofore sore grieved by such distresses, in so much as the mean (not withstanding that he hath whereby he may be distrained) doth make long delays before he will come into the court to answer for his tenant unto the writ of mean; and further, the case was most hard when the mean had nothing: in case also when the tenant was ready to do his services and customs unto his lord, and the chief lord would refuse to take such services and customs by the hands of any other than of his next tenant, and so such tenants in demean lost somewhiles the profits of their lands for a time, and somewhiles for their whole time, and hitherto no remedy hath been provided in this case; a remedy is provided and ordained hereafter in this form, that so soon as such tenant in demean (having a mean between him and the chief lord) is distrained, incontinent the

tringitur, statim perquirat sibi tenens breve de medio. Et si medius habens terram in eodem comitatu (6) diffugerit usque ad magnam districtionem (5), detur querenti in brevi suo de magna districtione talis dies, ante cuius adventum duo comitatus teneantur, et præcipiatur vicecom', quod distringat medium per magnam districtionem, prout in brevi continetur. Et nihilominus vicecomes in duobus plenis comitatibus solemniter proclamare faciat, quod huiusmodi medius veniat ad diem in brevi contento, responsurus tenenti suo. Ad quem diem si venerit, procedat placitum inter eos modo conjuncto. Et si non venerit huiusmodi medius, amittat servitium tenentis sui, et à modo non respondeat (7) ei tenens in aliquo, sed (omisso illo medio) respondeat capitali domino de eisdem servitiis et consuetudinibus, quæ prius facere debuit prædictus medius. Nec habeat capitalis dominus potestatem distringendi tenentis in dominico, dum prædictus tenens offerat ei servitia debita et consueta (8). Et si capitalis dominus exegerit plus quam medius ei facere deberet, habeat tenens in hoc casu exceptionem versus dominum quam haberet medius (9). Si vero medius nihil habuerit in potestate regis (10), nihilominus perquirat tenens breve suum de medio ad vicecomitem illius comitatus in quo distringitur. Et si vicecomes mandaverit, quod medius nihil habet unde potest summoneri, nihilominus sequatur breve de attachamento. Et si vicecomes mandaverit, quod nihil habet per quod potest attachari, nihilominus sequatur breve

[372] de magna districtione, et fiat proclamatio in forma prædicta. Si vero medius non habeat terram in comitatu in quo fit districtio, sed habeat terram in alio comitatu (11) tunc creetur breve originale ad summonendum medium ad vicecomitem illius comitatus in quo fit districtio. Et cum testificatum fuerit per illum vicecomitem, quod nihil habet in comitatu suo,

creatur

the tenant shall purchase his writ of mean. And if the mean, having land in the same county, absent himself until the great distress awarded, the plaintiff shall have such day given him in his writ of great distress, afore the coming whereof two counties may be holden, and the sheriff shall be commanded to distrain the mean by the great distress, like as it is contained in the writ, and nevertheless the sheriff in two full counties shall cause to be proclaimed solemnly, that the mean do come at a day contained in the writ, to answer his tenant: at which day, if he come, the plea shall pass between them after the common usage; and if he do not come, then such mesne shall lose the services of his tenant, and from thenceforth the tenant shall not answer him in any thing; but the same mean being excluded, he shall answer unto the chief lord for such services and customs as before he ought to have done to the same mean; neither shall the chief lord have power to distrain, so long as the aforesaid tenant doth offer him the services and customs due. And if the chief lord exact more than the mean ought to do, the tenant in such case shall have such exceptions as the mean should. And if the mean have nothing within the king's dominion, the tenant shall nevertheless purchase his writ of mean to the sheriff of the same shire wherein he is distrained. And if the sheriff return, that he hath nothing whereby he may be summoned, then shall the tenant sue his writ of attachment. And if the sheriff return, that he hath nothing to be attached by, he shall nevertheless sue his writ of great distress, and proclamation shall be made in form aforesaid. And if the mean have no land in the shire where the distress is taken, but hath land in some other shire, then a writ original shall issue to summon the mean unto the sheriff of the same

6

shire

exeat breve de iudicio ad summonend' medium ad vicecomitem illius comitatus in quo testificatum fuerit quod habet tenem', et fiat scēta in illo comitatu, quousq; perveniatur ad magnam districtionem, et proclamationem, sicut dictum est supra de medio habente terram in eodem comitatu in quo sit districtio. Et nihilominus fiat scēta in comitatu in quo nihil habet (sicut dictum est supra de medio nihil habente) quousq; perveniatur ad magnam districtionem et proclamationem, et sic post proclamationem in utroque comitatu factam adjudicetur medius de feodo et servitio suo (12). Et cum aliquando contingat, quod tenens in domino feoffatus est ad tenendum de medio per minus servitium, quam medius facere debuit capitali domino, cum post huiusmodi proclamationem attornatus sit tenens capitali domino, medio omisso, necesse habet tenens respondere capitali domino de servitiis et cons. quæ medius ei prius facere debuit, et postquam medius venerit in curiam, et cognoverit, quod acquietare debet tenentem suum, vel adjudicetur ad acquietandum, si post huiusmodi cognitionem aut iudicium queremonia perveniat, quod medius non acquietat tenentem (13), tunc exeat breve de iudicio, quod vicecomes distringat medium ad acquietandum tenentem, et ad essendum coram iusticiariis ad certum diem, ad ostendendum quare prius eum non acquietavit. Et cum per districtionem venerit, audiat querens. Et si querens verificare poterit, quod ipsum non acquietavit, satisfaciat de damnis, et per iudicium recedat (14) tenens quietus de suo medio, et attornetur capitali domino. Et si ad primam districtionem non venerit, exeat breve de alia districtione, et fiat proclamatio, et postquam testificatum fuerit, procedatur ad iudicium, sicut superius dictum est. Et sciendum est, quod per hoc statutum non excluduntur tenentes, quin habeant warrantiam (15), si de tenementis suis implacentur, super medios suos,

shire where the distress is taken, and when it is returned by the sheriff that he hath nothing in his shire, a writ judicial shall issue to summon the mean unto the sheriff of the same shire, in which it shall be testified that he hath land, and suit shall be made in the same shire until they have passed unto the great distress and proclamation, as above is said in the mean having land in the same shire in which the distress is taken. And nevertheless suit shall be made in the same shire where he hath nothing, as above is said of the mean that hath nothing, until the process come to the great distress and proclamation; and and so after proclamation made in both counties, the mean shall be fore-judged of his fee and service. And where it happeneth sometimes, that the tenant in demean is infeoffed to hold by less service than the mean ought to do unto the chief lord, when after such proclamation the tenant hath attorned to the chief lord, and the mean being excluded, the tenant must of necessity answer unto the chief lord for all such services and customs as the mean was wont to do to him. And after that the mean is come into the court, and hath confessed that he ought to acquit his tenant, or be compelled by judgement to acquit, if after such confession or judgement it is complained that the mean doth not acquit his tenant, then shall issue a writ judicial, that the sheriff shall distrain the mean to acquit the tenant, and to be at a certain day before the justicers, for to shew why he hath not acquitted him before; and when they have proceeded unto the great distress, the plaintiff shall be heard; and if the plaintiff can prove that he hath not acquitted him; he shall yield damages, and by award of the court the tenant shall go quit from the mean, and shall attorn unto the chief lord. And if he come not at the first distress,

*suos, et eorum hæredes, secundum quod prius habuerunt, nec etiam excluduntur tenentes (16), quin sequi possunt versus medios suos, secundum consuetudinem prius usitatam, si viderint quod processus eorum plus valeat * per antiquam consuetudinem, quam per istud statutum. Et sciendum est, quod per istud statutum non providetur remedium quibuscunque mediis, sed solummodo in casu cum sit unus medius (17) tantum inter dominum distringentem et tenentem, et in casu quando medius ille est plenæ ætatis (18), et in casu quando tenens, sine præiudicio alterius (19) quam medii, attornare se potest capitali domino, quod dictum est pro mulieribus tenentibus in dotem, et tenentibus per legem Angliæ, vel aliter ad terminum vitæ, vel per feodum talliatum, quibus pro aliquibus causis nondum est provisum remedium: sed (Deo dante) alias providebitur.*

tress, a writ shall go forth to distrain him again, and proclamation shall be made, and as soon as it is returned, they shall proceed in judgement, as before is said. And it is to be understood, that by this statute tenants are not excluded, but they shall have a warranty of the means and their heirs, if they be impleaded of their lands, as they have had before; nor the tenants shall be excluded, but that they may sue against their means, as they used heretofore, if they see that their process may be more available by the old custom, than by this statute. And it is to wit, that by this statute no remedy is provided to any means, but only in case where there is but one onely mean between the lord that distraineth and the tenant; and in case where that mean is of full age; and in case where the tenant may attorn unto the chief lord without prejudice of any other than of the mean, which is spoken for women tenants in dower, and tenants by the courtesie, or otherwise for term of life, or in fee-tail, unto whom for certain causes remedy is not yet provided, but (God willing) there shall be at another time.

(Regist. 160. Fitz. Mesne, 1. 3. 7. 11. 12. 15. 16. 17. 19. 20. 21. 24. 56. 58. Fitz. Proclamat. 20. 21. 1 Inst. 100. a. Fitz. Mesne, 3. 18. 47. 57. 66. 67. 70. Fitz. Mesne, 1. 53. Fitz. Avowry, 146. 168. Fitz. Mesne, 28. 29. Fitz. Process, 153. Fitz. Mesne, 20. 24. 38. 59. 68. 70. Fitz. Mesne, 68. 25. 35. 79. Rast. 433, &c.)

50 E. 3. 23.

One mischief here first mentioned before the making of this statute was, the great delays which were used in the writs of mesne, in which the proccesse at the common law was summons, attachment, and distress infinite; and yet the tenant in default of the mesne was presently distrained by the lord paramount, which mischief appeareth by the preamble of this act: for remedy whereof a more speedy proceeding is given by this act in a writ of mesne.

Another mischief was, when the mesne had nothing within the same county; for there the tenant was without remedy, and though the mesne had sufficient in another county, the common law extended not thereunto, in both which cases remedy is given by this act.

4 E. 3. 42.
F.N.B. 137. a.

(1) *Pro consuetudinibus et servitiis, &c.*] The distress must be taken for the customs or services which the mesne by reason of his tenure ought to doe to the lord, within which, sute service to a hundred

hundred is comprehended, but not sute reall, that is, by resiance either to hundred, leet, or tourne, for that is not by reason of his tenure.

But if the tenant be distrained for the reliefe of the mesne, or for reasonable aide, albeit they are rather improvements of services then services, yet the tenant shall have a writ of mesne, because they grow by reason of the tenure.

(2) *Et medius fit.*] If there be A. lord, B. mesne, C. mesne, D. tenant *per availle*, A. the lord paramount distrein D. for services, &c. he bringeth a writ of mesne against C. and recovereth damages against him, whereupon C. the mesne may have a writ of mesne against B. but if B. plead *nient distrein de son default*, the speciall matter must be shewed, and not to take the generall issue, and so every mesne shall have his writ against his mesne.

(3) *Qui tenentem acquietare debeat.*] There be two kinds of acquittals; one expresse, and the other implied: expresse, three manner of waies:

First, by fine or deed, either at the creation of the tenure, or after: secondly, by acknowledgement of acquittall: thirdly, by prescription.

Implied, five manner of waies:

First, by owelty of services; secondly, by tenure in frankalmoigne; thirdly, in frankmarriage; fourthly, by homage auncetrell; and fifthly, in dower.

(4) *In casu etiam cum tenens paratus esset facere capitali domino servitia et consuetudines exactas, et capitalis dominus servitia et consuetudines sibi debitas renuebat percipere per manum alterius, quam per manum proximi tenentis sui, &c.*] By the common law the lord paramount might have refused his services by the * hands of the tenant *per availle*, or by the hands of tenant for life, where the reversion was over, because the mesne or he in reversion was his very tenant in privity, for the which remedy is given by this act.

(5) *Usque ad magnam distractionem.*] This must be understood of a writ of mesne returnable into the court of common pleas, and not of a writ of mesne that is vicountell, and not returnable.

And although a writ of mesne be depending between the tenant and the mesne, yet the lord paramount may proceed, &c. for he shall not tarry till the matter be tried in the writ of mesne.

But it appeareth by Fleta, *Si medius sit paratus ipsum tenentem acquietare de servitiis, quod capitalis dominus ab eo exigit, tunc secundum equitatem juris subvenietur tenenti per breve, viz. quod capitalis dominus desistat*, and there the writ in that case appeareth.

(6) *Et si medius habens terram in eodem comitatu, &c.*] Here is provided a more speedy proceeding in the writ of mesne, if the mesne had land in the same county.

(7) *Et si non venerit hujusmodi medius, amittat servitium tenentis sui, et à modo non respondeat, &c.*] If the mesne appeare not at the grand distresse, he shall be fore-judged, that is to say, that the mesne shall lose the services of his tenant of the tenements before holden. And that the mesne being omitted, the tenant from thenceforth shall be *attendens et respondens* to the chiefe lord by the same services, as the mesne holdeth by.

But it is to be observed, that the immediate chiefe lord must be named in the fore-judger; for albeit he be a stranger to the writ, and by his death the writ of mesne shall not abate: yet in the judgement

5 E. 3. 49.
10 H. 6. 26.
39 H. 6. 31. a.
9 E. 4. 27.
F.N.B. 136. m.
18 E. 3. 19.
29 E. 3. 34.
39 E. 3. 19.
39 H. 6. 31. b.

31 E. 1. mesne.
55. 7 E. 2. ibid.
66. 20 E. 2.
ibid. 59. 8 E. 3.
49. 39 E. 3. 19.
38 E. 3. 10.
F.N.B. 136.

Lib. 6. 58. Bredimans case, lib.
9 fol. 110, 111.
21 E. 3. 49.
2 H. 6. 3. 8 H. 6.
16.

* [374]

F.N.B. 136. d.

Flet. li. 2. cap.
43. Brit fol. 58.
b.

Brit. ubi supra.

Flet. lib. 2. ca.
43. Brit. fol. 58.
10 H. 6. 26.

21 E. 3. mesne.
48. 10 H. 6. fol.
26. 4 H. 6. 28.

judgement he that is then immediate lord paramount must be particularly named.

(8) *Nec habeat capitalis dominus potestatem distringendi tenentes in dominico, dum prædictus tenens offerat ei servitia debita, et consuetia.*] Here three things are to be observed.

1. That the tenant must offer and tender the rent or service due upon the land, and not be ready only, by reason of the word (*offerat.*)

2. This must be done at the time, when the lord comes to distraine.

3. That this act is to be understood of, services, and customes which the tenant may doe, as payment of rents, delivery of heriot-service, or the like; but extendeth not to personall services annexed to the person of the mesne, as homage, fealty, &c. for he cannot say, I become your man: nor sweare to him fealty, &c. But after fore judger, then the tenant shall doe all manner of services which the mesne ought to have done, for then the mesnalty is extinct; but as long as the mesnalty remaines, the personall services remaine with the mesne, *servitia personalia sequuntur personam.*

(9) *Et si capitalis dominus exegerit plus, quam medius ei facere deberet, habeat tenens in hoc casu exceptionem versus dominum quam haberet medius.*] Hereby provision is made for the tenant to take any advantage that the mesne might do, if the chiefe lord demand other services then the mesne ought to doe, albeit he be a stranger to the avowry.

(10) *Si vero medius nihil habuerit in potestate regis.*] Here *sub potestate regis* is taken for the power of the king to administer justice to his subjects by his writs, *potestas regia est facere justitiam.* See the first part of the Institutes, sect. 199.

And by this branch remedy is given to the tenant where the mesne had nothing, where he had no remedy by the common law.

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(11) *Si vero medius non habeat terram in comitatu in quo fit districtio, sed habeat terram in alio comitatu, &c.*] Here is remedy given to the tenant, where the mesne hath land in a forraigne county.

(12) *Adjudicetur medius de feodo et servitio suo.*] Here also fore-judger is given in the cases here mentioned, which is a better and speedier remedy then the common law gave.

(13) *Et postquam medius, &c. cognoverit, &c. vel adjudicetur ad acquietandum. &c. si post, &c. medius non acquietavit tenentem.*] Medius, the heire of the mesne shall not be fore-judged within this statute, for that this act speaketh of the mesne onely, and not of the mesne and his heires.

(14) *Satisfaciat de damnis, et per judicium recedat, &c.*] This branch of the statute giveth damages and fore-judger, and the plaintife cannot take damages, and leave the fore-judger, but he must either take both according to this branch, or neither of them.

(15) *Et sciendum est, quod per hoc stat' non excluduntur tenentes, quin habeant warrantiam.*] By this clause the warranty of the tenant (which was ever much esteemed in law) is saved and preserved, and many deeds comprehended both warranty and acquittall.

(16) *Nec*

2 H. 6. avowry 1.
2 H. 6. fol. 3.
21 E. 3. 49.
Bredmans case,
ubi supra, li. 9.
fol. 110, 111.

Lib. 7. in Cal-
vins case, cap.
Itineris, Ver.
Magn. Chart.
fol. 154.

Mich. 17. E. 1.
in banco rot. 147.
Suff. Rich. de
Rokeles case.
31 E. 1. mesn.
55. 18 E. 2. ibid.
57. 46 E. 3. 31.

31 E. 1. mesn.
55. 13 E. 2. ib.
68. 46 E. 3. 31.
49 E. 3. 8.

8 E. 3. 49.

(16) *Nec etiam excluduntur tenentes, &c.*] Here the tenant hath election either to take the benefit of this act, by taking the proceſſe given by the ſame, or to take the proceſſe at the common law, and this was *abundans cautela*; for this ſtatute being in the affirmative, the tenant might have had election (if this claufe had not been) but *abundans cautela non nocet*: and the ancient ſages of the law did ever make things as plain, and leave as little to conſtruction, as might be.

13 E. 2. meſn. 68.
50 E. 3. 23.
F. N. B. 137. b.

(17) *Sed ſolummodo quando unus ſit medius, &c.*] Hereby it appeareth, that no fore-judge can be, but when there is but one meſne betweene the lord paramount and the tenant.

(18) *In caſu quando medius eſt plenæ ætatis.*] Albeit a feme covert be not here excepted, yet by good conſtruction ſhe is excepted.

7 E. 2. meſn. 76.
9 E. 2. ibid. 67.
7 E. 3. fol. 41.
34 E. 3. meſn.
47. Dyer 2. mar.
104. 14 E. 2.
tit. meſn. 79.

(19) *Sine præjudicio alterius.*] Theſe words were ſpecially intended of tenant in dower, or of tenant for life, or in taile with a remainder over; for againſt them no fore-judge ſhall be given, but their extent is farre more large.

If the diſſeiſor, or any other that hath a defeaſible title in the tenancy doth fore-judge the meſne, this ſhall not prejudice the diſſeiſee, or him that right hath; for they are within the remedy of theſe words, that every fore-judge ought to be *ſine præjudicio alterius*.

But if the daughter fore-judge the meſne, and a ſon is borne after the fore-judgement, the ſon ſhall not avoid it; for it was *ſine præjudicio alterius*, when the judgement was given.

If two joyntenants bring a writ of meſne, and the one is ſummoned and ſevered, and the other ſueth forth, he cannot fore-judge the meſne, becauſe he cannot *respondere capitali domino de eiſdem ſervitiis et conſuetudinibus, quæ prius facere debuit prædictus medius*.

14 H. 4. 37.

So it is, if there be two joynt meſnes, and the one appeare, and the other make default, no fore-judgement ſhall be, for the ſame cauſe neceſſarily collected upon the ſame words.

They that are ſeiſed in *auter droit*, as the biſhop in right of his biſhopricke, or the abbot or prior in the right of his monaſtery, or the like, ſhall neither fore-judge, nor be fore-judged, becauſe it is to be intended, that it cannot be done *ſine præjudicio alterius*, for that the conſent of them is not had, which by law to the alteration of any eſtate is requiſite, as the deane and chapter to the biſhop, and the covent to the abbot, prior, &c.

19 E. 3. tit.
meſn. Statham.

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If the meſne hanging the writ of meſne againſt him alien by ſine, albeit the right of the meſnalty paſſeth to the conuſee, yet the meſne may be fore-judged, and the conuſee ſhall not take advantage of theſe words, *ſine præjudicio alterius*, becauſe he came to the meſnalty, *pendente brevi*, and in judgement of law the meſne (as to the plaintife) remaine ſeiſed of the meſnalty; for, *pendente lite nihil immovetur*.

34 E. 3. meſn.
47.

CAP. X.

CUM in itinere justic' proclamat' fuerit, quod omnes qui breviam liberare voluerint, ea liberent infra certum terminum (1), post quem nullum breve recipiatur, multi de hoc confidentes, cum moram fecerint usque ad prædictum terminum, et nullum breve super eos fuerit liberatum, de licentia justic' recedunt, post quorum recessum adversarii sui ipsorum absent' percipientes, breviam suam porrigunt in cera, quæ aliquando per favorem, aliquando pro dono per vicecomitem recipiuntur, et illi, qui secure credebant recessisse, ten' sua amittunt: ut hujusmodi fraudi subveniatur impostum, statuit dominus rex, quod justic' in itineribus suis statuam terminum quindenæ, vel mensis, minoris vel majoris termini, secundum quod comit' fuerit major vel minor, infra quem terminum publice proclametur, quod omnes qui breviam liberare voluerint, ea liberent infra terminum illum. Et in adventum illius termini certificet vicecomes capitali justic' itineranti, quot breviam habet, et quæ, et quod ultra illum terminum nullum breve recipiatur, quod si receptum fuerit, processus per illud factus pro nullo habeatur (1): excepto quod breve (2) cessatum durante toto itinere relevari poterit. Breve etiam de dote de viris qui obierint al' seisti infra summationem itineris, assise ultimæ præsentationis, et quare impedit, de ecclesiis vacantibus, infra summationem prædictam, quocumque tempore ante recessum justic' recipiantur in itinere. Brevia etiam novæ disseisinæ, quocumque tempore facta fuerit disseisina, recipiantur in itineribus justic'.

Concedit dominus rex de gratia speciali (3) quod illi qui habent tenem' (4) in diversis comitatibus, in quibus

WHEREAS in the circuit of justices it was proclaimed, that all such as would deliver writs, should deliver them within a certain time, after which no writ should be received; many trusting upon the same, and tarrying until the said time, and no writ served upon them, departed by licence of the said justices; after whose departure their adversaries, perceiving their absence, delivered their writs in wax, which sometime by fraud, and sometimes for rewards, be received of the sheriff, and they, that thought to have departed quiet, lose their lands. For the remedy of such fraud from henceforth, the king hath ordained, that the justices in their circuits shall appoint a time of fifteen days, or a month, or a time more or less (after as the county shall happen to be more or less) within which time it shall be openly proclaimed, that all such as will deliver their writs, shall deliver them before the same time; and when the time cometh, the sheriff shall certify the chief justice in eyre how many writs he hath, and what, and that no writ be received after the same time; and if it be received, the process issuing thereupon shall be of none effect; but only that a writ abated any time during the circuit may be amended; also writs of dower of men that died within the summons of the circuit, assises of darrain presentment, quare impedit, of churches vacant within the foresaid summons, shall be received at any time before the departure of the justices; also writs of novel disseisin, at what time soever the disseisin was done, shall be received in the circuit of justices.

Our lord the king of his special grace granteth, that such as have land in divers shires where the justices make

quibus justic' itinerant, vel de quibusdam ten' in com' in quo justic' non itinerant, timent implacitar', et de aliis tenem' in comitatu, in quo justic' non itinerant, implacitentur: ut coram justic' apud Westm', vel * de banco domini regis, vel coram justiciariis ad assisas capiendas assignatis, vel in aliquo comitatu coram vic', vel in aliqua cur' baronum, facere possint generalem attornat' (6) ad prosequendum pro eis in omnibus placitis in itinere (7) justic' pro ipsis, vel contra ipsos motis vel movendis, durante itinere. Qui quidem attornatus, vel attorn', habeat potestatem in placitis motis in itinere quousque placitum terminetur (5), vel dominus suus ipsum amoverit, nec per hoc excusentur, quin sint in juratis, et assisis, coram eisdem justic' (8).

make their circuit, and that have land in shires where the justices have no circuit, that fear to be impleaded, and are impleaded of other lands in shires where they have no circuit, as before the justices at Westminter, or in the king's bench, or before justices assigned to take assises, or in any county before sheriffs, or in any court baron, may make a general attorney to sue for them in all pleas in the circuit of justices moved or to be moved for them, or against them, during the circuit; which attorney or attorneys shall have full power in all pleas moved during the circuit, until the plea be determined, or that his master remove him; yet shall they not be excused thereby, but they shall be put in juries and assises before the same justices.

Regist. 19. b. (13 Ed. 2. stat. 1. c. 4.)

(1) Cum in itinere justic. proclamatur fuerit, quod omnes qui brevibus liberari voluerunt, ea liberent infra certum terminum, &c.]

Hereby is recited the mischief which was before the making of this act, the remedy followeth.

Ut hujusmodi fraudi impofterum, statuit dominus rex, quod justiciarii in itineribus suis statuunt terminum, quindena, vel mensis, minoris vel majoris termini secundum quod comitatus fuit major vel minor, infra quem terminum publice proclametur quod omnes qui brevibus liberari voluerint ea liberent infra terminum illum, et in adventu illius termini certificet vicecomes capitalem justiciar' itinerant' quot brevibus habent et quæ, et quod ultra illum terminum nullum breve recipiatur, quod si receptum fuerit processus per illud factus pro nullo habeatur.] Upon this purview was great question, whether the king might dispense with this law, and give a further day then hereby is prescribed, and in the end adjudged that he might for advancement and furtherance of justice: of this purview, the Mirror with too much asperity saith thus, *L'estatute de suspension de briefes en eyres est reprovable come repugnant a la grand chartre que dit nous ne veerons a nul droit, ne de laierens, & pur quey sont briefes rebotables de audience eins pur le multitude des briefes que adonques se font & pur le petit nombre des justices perit droit de plusors.*

Fleta, li. 1. c. 19.

Tr. 6 E. 2. in
Thesaur. Regist.
fo. 19. F.n.b.
17. E.

Mirror, c. 5. § 5.

(2) Excepto quod breve, &c.] Here followeth five exceptions:

1. The first is, that a writ abated, may, during the whole eyre, be amended.

2. Writs of dower, of the seisin of men that dyed within the summons of the heir (which is by the space of forty dayes) before the beginning of the heir.

3. Assises of darrein presentment.

4. Quare impedit of churches vacant within the aforesaid summons, shall be received at any time before the departure of the justices.

5. Writs of assise of novel disseisin, at what time soever the

Brit. c. 2. Fleta,
lib. 1. c. 19. 27.

disseisin was done, shall be received during the eyre of the justices.

Regist. fo. 19,
20. F.N.B. 25.
c. e. 26. a. c. d.
18 E. 3. 46.
8 E. 3. 20.

* [378]

(3) *Concedit dom' rex de gratia speciali quod illi qui habent tenem', &c.*] Here is an act of grace, and therefore it is termed accordingly, *De * gratia speciali*; for where the king by his prerogative before this and other statutes might by letters patents, or by writ under his great seal, grant to any demandant or pl', tenant, or defendant, to make attorney in any action, and to command the judges to admit such persons to be attorneys for them: Now justly is this act stiled an act of grace, for that the king gave his royall assent to this law for the quiet and safety of his subjects, giving them power hereby to make attorneys in cases herein expressed, whereby the king lost such profit of the great seal, as he formerly received in such cases. *Statutum ex gratia regia dicitur, quando rex dignatur cedere de jure suo regio pro quiete et commodo populi sui.*

(4) *Illi qui habent, &c.*] This act extends aswell to corporations aggregate of many, as maior and commonalty, and to sole corporations, as to private persons: and it extendeth aswell to justices in eyre of the forest, as to other justices in eyre; see the fourth part of the Institutes, cap. Justices in Eyre, & cap. the Courts of the Forests, and the Register *ubi supra* for claim of liberties.

4 E. 3. Attorney
18. 8 E. 3. 9.
32 H. 6. 1.
33 H. 6. 49.
34 H. 6. 51.

(5) *Quousque placitum terminetur.*] By the judgement against the defendant, the warranty of attorney is determined; for thereby *placitum terminatur*, but onely to sue execution (which is the fruit of the judgement) within the yeer: and if he sue out execution within the yeer, he may prosecute the same after the yeer; but if he sue out no execution within the yeer, then after the yeer is ended after judgement, his warrant of attorney is determined.

8 E. 3. 20.
18 E. 3. 47.
F.N.B. 25 E.
Regist. 19, 20.

(6) *Attornatum generalem.*] Of this generall attorney you shall often reade in our books.

(7) *In omnibus placitis in itinere.*] This is not understood of an assise of novel disseisin, for it is *querela*, and not *placitum assise*, whereof (as elsewhere hath been said) there is plentifull authority in our books.

(8) *Nec per hoc excusentur quin sint in juratis et assis coram eisdem justis.*] The wisdom of parliaments, and of the sages of the law hath ever been, that able and sufficient men should not (to the hindrance of justice) be exempted for service in juries and assises.

Marlbr. cap. 14.
39 E. 3. 15.
34 H. 6. 25.
35 H. 6. 42.

C A P. XI.

DE *servientibus* (1), *balivois* (2), *camerariis* (3), et *quibuscunque receptoribus*, qui *ad compotum reddendum tenentur* (4): *concordatum est et statutum, quod cum dominus hujusmodi servient' dederit eis auditores* (5) *compoti, et contingat ipsos esse in arreariis super compotum suum omnibus allocatis,*

CONCERNING servants, bailiffs, chamberlains, and all manner of receivers, which are bound to yield accompt, it is agreed and ordained, that when the masters of such servants do assign auditors to take their accompt, and they be found in arrearages upon the accompt, all things

locatis, et allocandis (6), arrestentur corpora eorum (7), et per testimonium auditorum ejusdem compoti, mittantur et liberentur proximæ gaolæ domini regis (8) in partibus illis, et à vic', seu custode ejusdem gaolæ recipiantur (9), et carceri mancipentur * in ferris (10), et sub bona custodia, et in illa prisione remaneant de suo proprio viventes (11), quousque dominis suis de arreragiis plenariè satisfecerint. At tamen si quis sic gaolæ liberatus conquatur, quod auditores compoti sui ipsum injustè gravaverunt (12), onerando ipsum de receptis quæ non recepit, vel non allocando ei expensas aut liberationes rationabiles, et inveniat amicos, qui eum manucapere voluerint ad ducendum coram baronibus de scaccario, liberetur eis, et scire faciat vicecomes (in cujus prisione fuerit) domino, quod sit coram baronibus de scaccario (13) ad aliquem certum diem cum rotulis et aliis, per quos compotum suum reddiderit, et in præsentia baronum vel auditor', quos assignare voluerint, recitetur compotus, et fiat partibus justitia, ita quod si fuerit in arreragiis, committatur gaolæ de Fleete, ut supradictum est. Et si diffugerit, et gratis compotum reddere noluerit (14), sicut in aliis statutis alibi continetur; Marlbridge, cap. 23. distringatur ad veniendum coram justiciariis, ad compotum reddendum, si habeat per quod distringi possit. Et cum ad curiam venerit, dentur ei auditores compoti, coram quibus si fuerit in arreragiis, et statim arreragiaolvere non possit, committatur gaolæ custodiend' in forma prædict'. Et si diffugerit, et testificatum (15) fuerit per vicecomit', quod non sit inventus, exigatur de comit' in comitatum, quousque utlagetur. Et sit hujusmodi incarcerationis irreplegiabilis. Et caveat sibi vicecomes, vel custos ejusdem gaolæ, siue sit infra libertatem (16) siue extra, quod per commune breve, quod dicitur replegiare, vel alio modo sine assensu

things allowed which ought to be allowed, their bodies shall be arrested, and by the testimony of the auditors of the same accompt, shall be sent or delivered unto the next gaol of the king's in those parts; and shall be received of the sheriff or gaoler, and imprisoned in iron under safe custody, and shall remain in the same prison at their own cost, until they have satisfied their master fully of the arrearages. Nevertheless if any person being so committed to prison, do complain, that the auditors of his accompt have grieved him unjustly, charging him with receipts that he hath not received, or not allowing him expences, or reasonable disbursements, and can find friends that will undertake to bring him before the barons of the exchequer, he shall be delivered unto them; and the sheriff (in whose prison he is kept) shall give knowledge unto his master, that he appear before the barons of the exchequer at a certain day, with the rolls and tallies by which he made his accompt; and in the presence of the barons, or the auditors that they shall assign him, the accompt shall be rehearsed, and justice shall be done to the parties, so that if he be found in arrearages, he shall be committed to the Fleet, as above is said. And if he flee, and will not give accompt willingly, as is contained elsewhere in other statutes, he shall be distrained to come before the justices to make his account, if he have whereof to be distrained. And when he cometh to the court, auditors shall be assigned to take his accompt; before whom if he be found in arrearages, and cannot pay the arrearages forthwith, he shall be committed to the gaol to be kept in manner aforesaid. And if he flee, and it be returned to the sheriff that he cannot be found, exigents shall go against him from county to county,

assensu domini (17) *ipsum à prisona exire non permittat. Quod si fecerit, et super hoc convincatur, respondeat domino de damnis, per hujusmodi servientem sibi illatis, secundum quod per patriam verificare poterit, et habeat dominus suum recuperare per breve de debito* (18) *versus custodem. Et si custos gaolæ non habeat, per quod justicietur, vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit* (19), *per idem breve.*

county, until he be outlawed, and such prisoner shall not be repleviable. And let the sheriff or keeper of such gaole take heed, if it be within a franchise, or without, that he do not suffer him to go out of prison by the common writ called replegiare, or by other means, without assent of his master; and if he do, and thereof be convicted, he shall be answerable to his master of the damages done to him by such his servant, according as it may be found by the country, and shall have his recovery by writ of debt. And if the keeper of the gaol have not wherewith he may be justified, or not able to pay, his superior that committed the custody of the gaol unto him, shall be answerable by the same writ.

Fleta, lib. 2. c. 64. Brit. fol. 70. a. (1 Inst. 295. a. 2 Inst. 378. Fitz. Accompt, 96. 109. Fitz. Avowry, 220. Regist. 137. Rast. 14, &c. Fitz. Accompt, 23. 26. 47. 74. 106. 52 H. 3. c. 23. 29 Ed. 3. f. 5. 17 Ed. 3. f. 59. 1 R. 2. c. 12. 7 H. 4. c. 4. 2 Leon. 9. Fitz. Debt. 172. Fitz. Issu. 160. Bro. Ditt. 103. 2 Bulstr. 321.)

3. E. 2. 8. 4 E. 3.
7. 13 E. 3. Ac-
count 76. 41 E. 3.
ib. 74. 8 E. 3.
46. 2 R. 2. Ac-
count 45.
11 R. 2. ib. 48.
F.N.B. b. c. d. e.

* [380]

17 E. 2. Procl.
203. 18 E. 2.
Avowry 220.
17 E. 3. 59.
29 E. 3. 5.
See the first part
of the Institutes,
sect. 124.
For this *servien-*
tes, see towards
the end of this
chapter.

1. Part of the In-
stitutes, ubi sup.
1. Part of the In-
stitutes, 153.
Fleta, li. 2. c. 70.

43 E. 3. 21.
49 E. 3. 2.
5. E. 3. 17.
27 Aff. 3.

(1) *Servientibus.*] Every writ of account must be brought against one, either as bailife, receiver, or gardein in socage; and therefore against a servant as servant, or against an apprentice, or a controller, surveyor, messenger*, or the like, a writ of account lyeth not, unlesse he be charged as bailife or receiver.

A gardein in socage cannot be committed to prison by force of this act, for a gardein in socage is *in loco parentis*, and this act be- ginneth with *servientibus*, and this word *servientibus* is to be ap- plied to *balivis*, *camerariis*, et *receptoribus*; for this act soon after this saith, *Cum domini hujusmodi servientium dederit eis auditores*, &c. Where these words are to be observed, *viz. domini*, the lords or masters, and *servientes*, servants, which word *servientes* extends to all; and therefore the gardein in socage being no servant, nor the heir lord, or master is not by this act to be imprisoned, &c.

(2) *Balivis.*] This word is sufficiently known, and if gardein in socage occupy after the heir attain to the age of 14 yeers, he may be charged as bailife.

(3) *Camerariis.*] Receivers were anciently called chamberlains, because they were wont to keep the money received in chambers specially provided for that purpose; yet cannot he be charged as chamberlain in an account, but as bailife, or receiver, for the cause above said.

(4) *Et quibuscumque receptoribus qui ad compertum reddend' te- nentur.*] *Receptores* is a known word, and needeth no further ex- plication.

(5) *Dederit eis auditores.*] An account taken before one auditor, is not within the purview of this statute; for this act is in nature of

a com-

a commission, and a commission being made to two or more, cannot be executed by one alone.

By this act the auditors are judges of record, and therefore by consequence in an action of debt for the arrerages of an account before two or more auditors, the defendant shall not wage his law.

And by the same consequence of reason, if the lord be found in surplusage upon the account determined by the auditors as an incident to their authority in an action of debt brought by the bailife for this surplusage, the lord shall not wage his law, because by force of this act (they being judges of record) no wage of law can be allowed against their record: and so was it adjudged in the exchequer chamber, as it is reported in 20 H. 6. But if the account be made before one auditor, this (as hath been said) is out of the statute, and therefore there he shall wage his law; but the lord cannot be committed to prison (for the cause aforesaid) by force of this act.

In an action of account against a receiver, for 13s. 4d. or any other sum under 40s. the sherife in his county court shall not hold plea of it; and the reason thereof is, because the sherife cannot assigne auditors who (as hath been said) are judges of record, and the county court is no court of record.

(6) *Omniibus allocatis et allocandis.*] † By these words, if the lord be found in surplusage, it is within their authority, and therefore parcell of their record, and so in that case (as hath been said) no wager of law.

But albeit the auditors do disallow a just demand, yet shall he take no averment or advantage upon these words, against the record of the judgement of the auditors; for, *judicium pro veritate accipitur*, and *nemo potest contra recordum verificare per patriam*: but he hath remedy after by this act, by a writ of *ex parte talis* for his relief, whereof more shall be said hereafter in his proper place.

(7) *Arrestentur corpora eorum.*] Note at the common law, the proccesse in account was summons, attachment, and distresse infinite; by the statute of Marlbr. a writ of *monstravit de compoto* was given; and here by this branch the body may be arrested, and after by this act proces of outlawry is given in account, so as after the account determined the body of the defendant may be arrested, &c.

Note the words in effect be *super compotum suum, &c. arrestentur et liberentur*, so as the auditors by force of this act ought to commit him, &c. presently after the account determined.

(8) *Proxima gaule domini regis.*] This is intended of the next gaole, though it be not in the same county, for, as it hath been said, the statute is in nature of a commission, and therefore this word *proxima* must be pursued.

(9) *Et à vic' seu custode ejusdem gaule recipiantur.*] The auditors must make a warrant in writing under their seales to the sheriffe upon the speciall matter, and thereupon the sheriffe ought to receive the accountant in execution.

(10) *Carceri mancipentur in ferris.*] Hereby it appeareth that the sheriffe ought to keep him *in salva et arcta custodia*, and hath power by this act, if need require, to lay irons upon him for his safe keeping; but this the gaoler could not have done by the common law, as by all our ancient authors it appeareth.

20 H. 6. 17, 18.
41. 45. 8 H. 6.
15. 14 H. 6. 24.
22 H. 6. 35. 47.
lib. 10. fol. 103.
Denboulds case.
38 H. 6. 6.
2 H. 6. 41.
10 H. 6. 24, 25.
Denboulds case,
ubi supra.

5 H. 4. cap. 8.

20 H. 6. 17, 18.
14 H. 6. 24.
Vide infra, †.

43 E. 3. 21.

Marlbr. cap. 23.
lib. 3. fol. 11.
Sir William
Herberts case.

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46 E. 3. 30.
27 H. 6. 8. li. 8.
fo. 119. D. Bon-
hams case.
13 E. 3. barre
253. 27 H. 6. 8.

D'er, 24 H. 8.
249. lib. 3. fol.
44. Boytons case.
Lib. 8. fol. 100.
Pl. Com. 360. a.
Brac. 1. 3. 105.
137. Brit. fo. 14.
17. Fleta, l. 1.
ca. 26. Mirror,
c. 5. § 1. 8 E. 2.
Coron. 432.
Vide 3. part des
Institutes. Cap.
petit tref. in
fine.

(11) *De suo proprio viventes.*] By this clause it appeareth, that he that is so imprisoned must live of his owne.

Britton, fol. 70.
Fleta, l. 2. c. 64.
Regist. 137.
F.N.B. 129. f.
13 E. 3. barre
253. 14 E. 3.
account 74.
2 E. 3. 12.

(12) *Auditores compoti sui ipsum injuste gravaverunt.*] By this clause is the writ of *ex parte talis* given to the accountant, if the auditors assigned by the lord either charge him *de receptis quæ non recepit, vel non allocando ei expensas aut liberationes rationabiles*, and this writ is, in nature of a commiſſion to the barons of the exchequer, for that they are the ſoveraigne auditors of England to heare and audite the account, *et quod fiat justicia partibus.*

But this writ lieth not, but where the account is taken before auditors assigned by the lord, for if there be a writ of account brought, and the court assigneth auditors, there lieth no writ of *ex parte talis*, for in that caſe he ought to ſhew his grieve to the juſtices, and they ought to doe him juſtice, and the writ of *ex parte talis* is grounded upon this act, where the lord assigneth auditors.

Fleta, l. 2. c. 64.

(13) *Quod fit coram baronibus de ſcaccario.*] The writ in the Register, and F.N.B. *ubi ſupra*, is *coram theſaurario et baronibus noſtris de ſcaccario*, but it ought to be *coram baronibus de ſcaccario* according to this act, and that the rather, becauſe the barons are (as hath been ſaid) the ſoveraigne auditors of England, and herewith agreeth Fleta.

Dier. 36 H. 8.
c. 64.

Upon ſureties found he ſhall be at large to follow his writ of *ex parte talis*, before the barons, but if it be found that he was in arrearages, he ſhall be in execution again.

Maib. ca. 23.

(14) *Et ſi diffugerit, et gratis compotum reddere noluerit, &c.*] *Vide* Marlebridge whereby the writ *de monſtravit de compoto* is given.

Fleta, *ubi ſupra*.

(15) *Et ſi diffugerit et teſtificatum, &c.*] Here is proces of outlawry given in account.

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11 H. 4. 73.
See 1 R. 2. c. 12.

(16) *Et caveat ſibi vicecomes vel cuſtos ejusdem gaolæ ſi ſit infra libertatem.*] This act extends to all keepers of gaoles, and therefore if one hath the keeping of a gaole by wrong, or *de facto*, and ſuffereth an eſcape, he is within this ſtatute, as well as he, that hath the keeping of it *de jure*.

27 H. 8. 24. b.
per Curiam.

(17) *Sine aſſenſu domini.*] And this aſſent may be by *paroll*, and ſhall be a ſufficient barre in an action of debt brought for the eſcape.

14 E. 4. 3. Dier,
15 El. 322.
16 E. 3. damag.
81. 13 E. 3.
barre 253.
42 Aff. Pl. 11.
45 E. 3. 1.
2 R. 2. iſſue 160.
9 H. 6. 19.
30 H. 6. 6. Dier,
10 Eliz. 275.

(18) *Et habeat dominus ſuum recuperare per breve de debito, &c.*] There was no action of debt againſt the gaoler for an eſcape at the common law, but the party was driven to his ſpeciall action upon his caſe, which action was grounded upon a treſpaſſe or wrong, and not upon any contract in deed or in law, but this act firſt gave the action of debt againſt the gaoler, which had let one to eſcape, which was committed to priſon by auditors for arrearages of account, but it lieth not againſt the gaolers executors, becauſe it is a treſpaſſe, and before any other act of parliament by the equity of this act an action of debt did lie againſt the gaoler for an eſcape in court pipowders, and ſo in all other caſes.

1 R. 2. cap. 12.

Afterwards the ſtatute of 1 R. 2. for a further declaration gave the action againſt the gaerdein of the Fleet.

But albeit this act, and the ſtatute of 1 R. 2. alſo doth ſpeake *per breve*, yet a bill of debt lieth alſo by the equity of this and that ſtatute, albeit it hath been holden to the contrary, but ſince it hath been

been often adjudged that a bill of debt is maintainable upon the said acts.

Now for as much as the statutes doe give recovery by writ of debt, incidently, they do give damages also.

This act doth extend to feme coverts and infants, that are keepers of gaoles, to charge them in an action of debt for the escape of one in execution.

(19) *Respondeat superior suus, qui custodiam hujusmodi gaolæ sibi commiserit.*] This is to be understood, when one that hath the custody of a gaol of freehold or inheritance, committeth the same to another that is not sufficient, his superior shall answer for the escape of the prisoner; but he shall not have the action of debt against the superior as long as the inferior is sufficient.

The mayor and citizens of London have the sherrivalty of London in fee, and the sheriffes of London are gardeins under them, and removable from yeare to yeare, in this case the sheriffes of London are gardeins, and the mayor and citizens their superiors; and though the sheriffes appoint a keeper under them, yet he is not within this statute, because it is intendable when the gardein commeth in by him that hath the freehold or inheritance in the custody, for this act doth extend but unto two such degrees, for there cannot be two superiors within this act, but one superiour and one inferiour.

The duke of Norfolk being marshall of England of inheritance, and having authority to make a deputy doth make a deputy, who hath the custody of the gaole, he is the gardein, and the duke of Norfolk his superiour within this act.

42 Aff. p. 11.
7 H. 6. 5.
Pl. Com. 38. a.
16 E. 3. dam. 34.
13 E. 3. ibid.
Lib. 8 fol. 44.
Wittinghams
case.
See cap. 43.
13 E. 3.
barre 253.

11 E. 2. Debt
272. 11 El.
Dier, 278.

11 El. ubi supra.

C A P. XII.

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QUIA multi per malitiam (1) volentes alios gravare, procurant falsa appella (2) fieri de homicidiis, et aliis felonis (3), per appellatores nihil habentes, unde domino regi pro falso appello, nec appellatis de damnis respondere possint: statutum est, quod cum aliquis sic appellatus de felonis sibi imposita se acquietaverit in curia regis modo debito (4), vel ad sectam appellatoris, vel domini regis: justiciarii coram quibus auditum erit hujusmodi appellum et terminatum, puniant appellatorem per prisonam unius anni, et nihilominus restituant hujusmodi appellatores damna appellatis, secundum discretionem justiciorum, habito respectu ad prisonam vel arrestationem quam occasione hujusmodi appellorum sustinuerint appellati, et ad infamiam suam (5), quam

FORASMUCH as many, through malice intending to grieve other, do procure false appeals to be made of homicides and other felonies by appellors, having nothing to satisfy the king for their false appeal, nor to the parties appealed for their damages; it is ordained, that when any, being appealed of felony surmised upon him, doth acquit himself in the king's court in due manner, either at the suit of the appellor, or of our lord the king, the justices, before whom the appeal shall be heard and determined, shall punish the appellor by a year's imprisonment, and the appellors shall nevertheless restore to the parties appealed their damages, according to the discretion of the justices, having respect to the imprisonment

quam per imprisonamentum, vel alio modo incurrerunt, et nihilominus versus dominum regem graviter redimantur. Et si forte hujusmodi appellatores non habeant, unde prædicta damna restituere possint, inquiratur per quorum abbettum (6) formatum fuerit hujusmodi appellum per malitiam, si appellatus hoc petat. Et si inveniatur per illam inquisitionem, quod aliquis sit abbettator per malitiam (7), per breve de iudicio ad sectam appellati distringatur (8) ad veniendum coram iustic'. Et si legitimo modo convictus fuerit de hujusmodi abbetto per malitiam, puniatur per prisonam, et teneatur ad restitutionem damnorum, sicut superius dictum est de appellatore. Vide anno 1 R. 2. cap. 13. Nec jaceat de cætero appellatori in appello de morte hominis essonium (9), in quacunque curia ubi appellum fuerit terminandum.

imprisonment or arrestment that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise, and shall nevertheless make a grievous fine unto the king. And if peradventure such appellor be not able to recompense the damages, it shall be inquired by whose abetment or malice the appeal was commenced, if the party appealed desire it; and if it be found by the same inquest, that any man is abettor through malice, at the suit of the party appealed he shall be distrained by a judicial writ to come before the justices; and if he be lawfully convict of such malicious abetment, he shall be punished by imprisonment and restitution of damages, as before is said of the appellor. And from henceforth in appeal of the death of a man there shall no essoin lie for the appellor, in whatsoever court the appeal shall happen to be determined.

(12 Rep. 126. Hob. 98. Fitz. Damage, 77. Fitz. Coron. 12. 77. 98. 386. 11 Rep. 77. 1 E. 3. stat. 1. c. 7. Regist. 56. 12 Rep. 125. Cro. El. 223. 71. 14 H. 7. 2. 26 H. 8. 3. Dier, 120. 131. 8 H. 5. 6. 8 Ed. 4. 3. Regist. 134.)

See the Mirror,
c. 4. de homicide.
48 E. 3. 22.
Stamf. Pl. Cor.
167. c. F.N.B.
114. f. Regist.
134.

By the words hereof it appeareth, that before this statute the defendant being duly acquitted, should recover his damages, but that is to be understood in a writ of conspiracy, wherein he should recover damages for satisfaction in regard of the infamy, imprisonment, and vexation done to him, and further that the parties convicted should be fined to the king and imprisoned; which, I have read, began in this sort before the reign of H. 1. They which plotted, or compassed the death of a man under pretext of law by bringing false appeales, or preferring untrue indictments against the innocent of felony, who being duly acquitted, both the appellant and his abettors were to suffer death.

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24 E. 3. 24.
27 Aff. 59. Tr.
18 E. 3. Coram
rege. Rot. 143.
43 E. 3. con-
spir. 11.

But king H. 1. by authority of parliament did mitigate the severity of this ancient law (lest men should be deterred and afraid to accuse) and did ordaine that if the delinquents were convicted at the suit of the party, they should make satisfaction, and be fined and imprisoned: but if they were convicted by judgement at the suit of the king (whom they pretended to intitle to the forfeiture) then they should lose the freedom of the law, they should be so infamous as never to be any witness, or to be of any jury. That they should never come in or neare the kings court, but make their attournies, that they, their wives, and their children, should be cast out of their houses, and their houses prostrated, their trees eradicated

cated and subverted, their meadows plowed up and wasted, every thing to be destroyed which nourished or comforted them in respect of the villany, and shame done to the delinquent, all against nature and order, for that the delinquent sought the blood of the innocent under pretext and colour of law, and this in later bookes is called a villanous judgement, all which in case of conspiracy remaine a constant law to this day. But this act doth give the party a speedier remedy for his satisfaction then he had before, as hereafter shall appeare.

(1) *Per malitiam.*] These words doe open divers windowes for the better understanding and inlightening of the generall words of this statute.

1. If the appellee be first indicted of the felony whereof he is appealed, the appeale shall not be understood to be commenced *per malitiam*, because the plaintiffe hath a foundation to build upon, *viz.* an indictment by the other of twelve or more men, so as it shall be presumed that the plaintiffe was moved to his appeale by the indictment, *et non per malitiam*; for in those dayes (as yet it ought to be) indictments taken in the absence of the party, were formed upon plain and direct prooffe, and not upon probabilities or inferences: but if the indictment be insufficient, then it is in judgement of law as no indictment, and then the appeale may notwithstanding be commenced *per malitiam*, *et sic in similibus*, or if it be a good indictment, and found after the appeale commenced, yet may the appeale be commenced *per malitiam*.

2. If one be appealed of murder, and it is found by verdict that he killed him *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause, for *quod quisque ob tutelam corporis sui fecerit, jure id fecisse videtur; et sic de similibus*.

3. The heire or other near of kin, may, abbet the wife plaintiffe in the appeale, *Et sic adjudicatur quod pater, mater, frater, &c. non sunt in casu hujus statuti ratione propinquitatis sanguinis, et ad eos pertinet prædictam mortem ulcisci*: Hoylands case, and cannot be said to be *per malitiam*.

4. *Malitia* referreth onely to the procurers and abbettors, as it appeareth by the expresse words of this act.

(2) *Falsa appella.*] Soone after the making of this statute, the wife and her second husband brought an appeale for the death of her former husband, the record saith, *Non potest esse appellatrix pro morte prioris mariti, &c. ipsa pro repellend. pæna statuti pro falsis appellis advocat appellum suum esse justum nec falsum, licet sit cassatum, et licet illud prosequi non potest, quia habet virum; quæ quidem causa potius est quædam stultitia quam falsitas, ideo ex gratia curiæ concess. est in præsen. aliorum justic. de banco, postquam prisonam 15. dierum habuerit, quod finem fac. cum rege.*

(3) *De homicidio et aliis felonis.*] This is not onely intended of such offences as were felonies at the making of this act, but of all such offences also, as have been made felonies by any act of parliament since this act.

(4) *Se acquietaverit in curia regis modo debito.*] This statute doth extend both to acquittals in deed, and to acquittals in law.

Acquittals in deed, as either by verdict, or by battell, and in that case when the plaintiffe yeelds himselfe creant, or vanquished in the field, the judgement shall be that the appellee shall goe quite, and that he shall recover his damages against the appellor, but if the

Pasch. 30 E. 1.
Coram rege.
Northampt. Joha.
de Bosco, &c.
Hil. 26 E. 1. Co-
ram rege. Leic.
Will. Burnell.
22 Aff. 39.
40 Aff. p. 18.
40 E. 3. 42.
33 H. 6. 2.
14 H. 7. 2.
26 H. 8. 3. 4.
First part of the
Institutes, sect.
20 S. 9 H. 4. 2.
9 H. 5. 2.
20 E. 4. 6.

22 Aff. p. 77.

Term. Mich.
21 E. 1. Co-
ram rege. Rot.
276. Hoylands
case. 6 E. 3. 33.

Mich. 34 E. 1.
Coram rege.
Line. Rot. 19.
Potius stultitia
quam falsitas.

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Regist. 34.
24 E. 3. 73.
41 E. 3. Coro.
98. 21 H. 6.
Cor. 12.

the plaintiffe had been slaine, then no judgement can be given against a dead person.

Acquittals in law, as if two be appealed of felony, the one as principall, and the other as accessary, and both of them plead not-guilty, &c. and the jury doth acquite the principall, in this case by law the accessary is acquitted, and shall recover damages by this act against the appellant, &c. or may have his writ of conspiracy at the common law.

But if the principall be acquitted by verdict, proces depending against the accessory, the accessory shall not recover damages within this statute, because no jury can be returned to asseſſe them.

If one be appealed as accessory to two principals, one of the principals is acquitted, the accessory shall recover no damages untill the other principall be acquitted.

If the plaintiffe in an appeale be non-suit, and the defendant is arraigned at the suit of the king, and acquitted, he shall recover his damages by this act, for the words be, *Vel ad ſectam appellantis vel domini regis*, but this suit of the king must be intended upon the appeale after non-suit, for an acquittall upon an indictment is not within this statute.

For *debito modo acquietatus*, see 9 H. 5. 2. that the defendant being acquitted by verdict, yet if his life was never in jeopardy either in the originall, or proces, though it be in default of the plaintiffe himſelfe, yet is he not *debito modo acquietatus* within this statute.

The wife of Copleſton brought an appeale of murder against Stowell, and five of his ſervants as principals by being preſent, aiding and abetting Stowell to commit the murder, and Stowell appeared, against whom the plaintiffe declared with a *ſimul cum* of his five ſervants, and Stowell pleaded not-guilty, and proceſſe was continued against the other five, and by verdict it was found that Stowell killed Copleſtone in his owne defence, whereupon he was acquitted, and had his pardon of grace; and it was reſolved by all the judges of England, that this acquittall of him was in law an acquittall of all the other five that were charged as principals by being preſent, aiding, and abetting, and Stowell could not upon this ſtatute recover damages for the cauſe before remembred.

If the defendant plead that there is a nearer heire, and iſſue thereupon taken, and found for the defendant, he is diſcharged of the action, but is not acquitted of the felony within the purview of this ſtatute; ſo it is if the defendant be diſcharged by clergy, he is not acquitted within the purview of this ſtatute.

If the defendant wage battell, and the plaintiffe demurre upon it, and it is adjudged against the plaintiffe, the defendant is diſcharged of the appeale, but hee is not acquitted, untill he be acquitted of the fact at the ſuit of the king.

Damna appellatis ſecundum diſcret' juſticiar' habito reſpectu ad priſonam.] Though this branch bee generall, yet every appellee ſhall not upon his acquittall recover damages, for if a monke be appealed, or a feme covert be appealed alone without her husband and acquitted, they cannot recover any damages by this act in reſpect of their diſability, for the generall words of this act doth not enable any to recover damages that thereunto was diſabled by law. But if an appeale bee brought against the husband and wife, and they

33 H. 6. 2.
8 H. 5. 6.

41 Aff. 24.

3 Mar. 120.
Dier.

41 Aff. 24.
46 E. 3. Coro.
102. 14 H. 7. 2.
9 H. 5. 2.
Stamf. Pl. Cor.
135. F.N.B. 214.

9 H. 5. 2.
20 E. 4. 5.
9 H. 4. 2.

Faſch. 15 Eliz.
Coram rege.
Dier Manu-
ſcript.

27 Aff. 25.

17 E. 2. Coro.
386.

22 E. 3. Coro.
276. Artic.
Cleri. c. 16.
Lib. 9. fol. 73.
D. Huſſeyes caſe.
Lib. 11. fol. 77.
Magd. Coll. caſe.
12 R. 2. judg.
108.

they be acquitted, damages shall be given to the husband alone for his damage, and to the husband and wife for the damage of the wife.

And where severall persons be acquitted, the damages must be severall, for the words of the statute be *habito respectu ad personam*.

But then may be demanded, what remedy hath the monke or feme covert being solely appealed: the answer is, that they have no remedy by this statute, but the abbot and monke, and the husband and wife may have a writ of conspiracy at the common law.

Whensoever any is acquitted by verdict, and yet his life was never in jeopardy, either by reason of the erroneous proces, or originall, or otherwise, though this be within the letter of the law, yet it is out of the meaning, and therefore the defendant in that case shall recover no damages.

(5) *Ad infamiam suam.*] For a mans fame is above all things to be repaired.

*Omnia si perdat, famam servare memento :
Que semel amissa, postea nullus eris.*

Cato.

(6) *Et si forte hujusmodi appellatores non habeant, &c. inquiratur per quorum abettum.*] If the defendant in an appeale be tried before justices of *nisi prius*, albeit they have but *delegatam potestatem*, yet shall they inquire of the insufficiency of the plaintiffe, and of the abettors, and the words of this act are, *Quod justic' coram quibus auditum fuerit appellam et terminatum*; but that great over-ruler *experientia* hath ruled, and over-ruled it by precedents, that they cannot give judgement for the damages.

This insufficiency of the plaintiffe in the appeale must be found by the jury, and cannot come in by the averment of the party, and so it is in other like cases.

But here it may be demanded, What if the plaintiffe in the appeale be sufficient for part of the damages, and not for all, may not the defendant by this act recover part against the plaintiffe, and part against the abettors? And it is resolved that he must recover either all against the plaintiffe, or all against the abettors, and not by parcels, so as if the plaintiffe be not sufficient for the whole, the defendant shall recover the whole against the abettors, for *prædicta damna et omnia damna*, are all one.

It is a certain conclusion upon these words of the statute, that where damages shall not be recovered against the plaintiffe, there none shall bee recovered against the abettors; also where the plaintiffe is sufficient and so found by the jury, the abettors shall not be inquired of.

(7) *Abbettator per malitiam.*] Abbettors were found (upon the acquittall of the defendant) by name, *Et quod procuraverunt, insin-gaverunt et abbettauerunt prædictum querentem ad capiendum et prosequendum appellum prædictum in forma prædicta*, and said not *per malitiam*, and yet allowed of. But *nota* the surer way is to pursue the words, *falso et per malitiam*, according to this act.

(8) *Per breve de judicio ad scētam appellati disfringatur, &c.*] This writ is given in lieu of the writ of conspiracy at the common law, the abbettors comming in upon this proces may travers the abbetment, because they were estrangers to the verdict, and if

Tr. 30 E. 1.
Rot. 2. London.
8 H. 6. 5, 6.
24 E. 3. 73.

9 H. 5. 2. ubi
supra.

3 E. 2. Action
sur lestat. 28.
22 E. 4. 19.
10 E. 4. 14.
Dier, 3 Mar. 120.
Tr. 30 E. 1.
Coram rege.
Rot. 2. London.

8 E. 4. 3.
8 H. 5. 6.
17 E. 2. Cor.
386. 26 H. 8.
3, 4. Tr. 30 E. 1.
ubi sup.

3 Mar. Dier,
120.
Tr. 30 E. 1.
ubi supra.

Reg. 34. 8 E. 4.
3. 17 E. 2. Cor.
386. Tr. 19 E. 2.
Coram rege.
Rot. 82. 40 E. 3.
the dam. 77.

Tr. 30 E. 1.
ubi supra.
22 E. 4.
Coro. 45.

the defendant that sueth the distresse be non-suit, yet may he have a new writ, and it is not peremptory to him. And albeit the jury finde neither the time, nor the place where the abbetment was, yet if they finde the abbettors, it is sufficient, for when the plaintiffe appeareth, the defendant may shew time and place in good time.

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46 E. 3. Coron.
102.
3 E. 2. Action
fur lestatut. 28.
8 H. 6. cap. 10.
F.N.B. 115. i.
Kelwey, 21.
Tr. 30 E. 1. Co-
ram rege. Rot. 2.
Hil. 35 E. 1. ib.
Rot. 19.
Tr. 19 E. 2.
ibid. 82. Mich.
14 H. 7. ib. Rot.
76. Tr. 14 H. 7.
ib. Rot. 74. Hil.
10 H. 7. ib. Rot.
38. Mich.
19 H. 7. ib.
Rot. 27. Liure
de entries. Raft.
56. & 297. Stamf. Pl. Cor. 297.

Note in 46 E. 3. the court granted first a *venire facias*, and then distresse, but it seemeth that the processe given by the statute is a distresse infinite.

But if the jury give too small damages, it being but an enquest of office, the plaintiffe may have an originall writ of abbetment, and count to greater damages. *Vide* 8 H. 6. cap. 10.

Note reader, that judiciall precedents, and the right entries of pleas upon this (or any other) statute are good interpreters of the same, and of questions that have been, or may be moved thereupon.

(9) *Nec jaceat de cætero appellatori in appello de morte hominis effonium.*] The defendant that is appealed of the death of man ought to have convenient expedition, and not to be detained in prison, or to live under the infamy of a murdurer longer than there is cause: and this statute was chiefly made for the benefit of the defendant.

Vide the statute of 1 E. 3. cap. 7. parliament' primo, & statut' de 1 R. 2. cap. 13.

C A P. XIII.

QUIA etiam vicecomites multotiens fingentes aliquos coram eis in turnis suis indictatos de furtis, et aliis malefactoribus (1), capiunt homines non culpabiles, nec legitimo modo indictatos, et eos imprisonant, ut ab eis pecuniam extorqueant (3); cum legitimo modo per duodecim juratores non fuerint indictati: statutum est, quod vic' in turnis suis, et alibi, cum inquirere habeant de malefactoribus per præceptum regis (4), vel ex officio suo, per legales homines (2) ad minus duodecim faciant inquisitiones suas de hujusmodi malefactoribus, qui hujusmodi inquisitionibus sigilla sua apponant (5), et illos quos per hujusmodi inquisitiones invenerint culpabiles, capiant et imprisonent, secundum quod alias fieri consuevit. Et si aliquos aliter imprisonaverint, quam per hujusmodi inquisitiones indictatos, habeant hujusmodi imprisonati

FORASMUCH as sheriffs, feign-
ing many times certain persons to be indicted before them in their turns of felonies and other trespasses, do take men that are not culpable nor lawfully indicted, and imprison them, and do exact money from them, whereas they were not lawfully indicted by twelve jurors; it is ordained, that sheriffs in their turns, and in other places where they have power to enquire of trespassors by the king's precept, or by office, shall cause their inquests of such malefactors to be taken by lawful men, and by twelve at the least, which shall put their seals to such inquisitions; and those that shall be found culpable by such inquests, they shall take and imprison, as they have used aforesometimes to do. And if they do imprison other than such as have been indicted by

imprisonati actionem suam per breve de imprisonment (6) versus vicecom', sicut haberent versus quamcunque aliam personam, qui eos imprisonaret sine warranto. Et sicut dictum est de vicecom' observetur de quolibet balivo libertatis (7).

by inquest, the parties imprisoned shall have their action by a writ or imprisonment against the sheriffs, as they should have against any other person that should imprison them without warrant. And as it hath been said of sheriffs, so shall it be observed of every bailiff of franchise.

(2 Inst. 387. 1 E. 3. stat. 2. c. 7. 1 E. 4. c. 2.)

(1) *Quia etiam vicecomites multotiens fingentes aliquos coram eis in turnis suis indicatos de furtis et aliis malefactis.* [Two things are provided, or rather declared by this act. Fleta, li. 2. c. 45.]

1. *Per legales homines ad minus 12. faciant inquisitiones.*

That indictments in tournes ought to be found by 12. at the least.

(2) *Legales homines.* [More shall be said hereof when we come to the eight and thirtieth chapter of this parliament, and the ninth chapter of Articuli super Chartas. [388] F.N.B. 165.]

(3) *Ut ab eis pecuniam extorqueant.* [This is the greatest injustice, when the innocent under colour of justice, whereby he ought to be protected, is oppressed, and wrought to give money to redeem his vexation: three things (it is said) overthrew the flourishing estate of the Roman empire, *Latens odium, juvenile consilium, et privatum lucrum.* Vide cap. Itineris.]

By this act you may see that justice was pretended, and sordid lucre intended, which this act in reliefe of the innocent provideth to prevent.

(4) *Per præceptum regis.* [That is, by the kings writ or commission; but thereupon grew so many evils and mischiefs for the singular profit of the sherifes, that by a latter statute it is provided that no such writs or commissions should be granted to them; so as at this day the sherifes cannot proceed in those cases per præceptum regis. See hereafter how this power *ex officio* is restrained. 28 E. 3. cap. 9. F.N.B. 92. c. 144. l. 250. a.]

(5) *Qui hujusmodi inquisitionibus sigilla sua apponant.* [The 2. part is, that the jurors do put their seals to the inquisitions or indictments. 2.]

By a latter statute, these indictments are to be by a roll indented, whereof one part is to remain with the indictors, and the other part with him that takes the enquest. 1 E. 3. Parliam. 2. cap. 17.]

This act of 1 E. 3. doth extend to presentments or indictments, not only in tournes, but in leets also, and the like.

See the statute of 1 R. 3. of what quality, hability, and liveliness, the indictors in tournes and leets ought to be. 1 R. 3. ca. 4.]

But such corrupt and partiall proceedings upon presentments and indictments before the sherife *ex officio*, were, notwithstanding all these provisions in tournes and leets, continued, untill by the statute of 1 E. 4. the power of them, save only to take presentments and indictments, and to deliver the same to the justices of peace at the next sessions of the peace, &c. is taken away; and by that act authority is given to justices of peace, to award processe upon all such such 1 E. 4. c. 2. 4 E. 4. 31. 8 E. 4. 5. lib. 9. fol. 96. Strata Marcella.]

such presentments and indictments delivered to them, &c. which is to be intended of such as be lawfull.

(6) *Per breve de imprisonament'.]* This act doth not onely prescribe a form for the sherife to pursue, but giveth the party remedy against the sherife, if he pursueth not the form of the act; for, *Non observata forma infertur adnullatio actus.*

(7) *Et sicut dictum est de vicecom', observetur de quolibet balivo libertatis.]* Every bailife of franchise, that is, of leets, and views of frankpledge, which are exempted out of the sherifes tourn, and are the franchises here intended.



